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6  
7 **STATE OF CALIFORNIA**  
8 **STATE WATER RESOURCES CONTROL BOARD**

9 In re: ) Order No.: R2-2006-0030  
10 )  
Petition of TWC STORAGE, LLC ) PETITION FOR STATE BOARD REVIEW OF  
11 ) REGIONAL ACL ORDER No. R2-2006-0030  
12 ) [CA Water Code §13320(a)]  
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29 **INTRODUCTION**

30 Pursuant to Water Code section 13320(a) and California Code of Regulations, title 23, section  
31 2050, TWC Storage, LLC ("TWC") respectfully petitions the State Water Resources Control Board  
32 ("State Water Board") for review of the San Francisco Bay Regional Water Quality Control Board  
33 ("Regional Water Board or Board") Order Setting Administrative Civil Liability No. R2-2006-0030  
34 dated May 10, 2006. TWC seeks review of several substantial issues in connection with the decision of  
35 the Regional Water Board.

36 TWC Storage, LLC (TWC) is a victim of an accident that happened when demolition contractors  
37 picked up a transformer from a facility that had been certified as properly closed spilling PCE. The  
38 Board issued an ACL and fined TWC \$25,000.00 despite the fact that TWC did not cause and did not  
39 have the ability to prevent the accident. TWC did not unlawfully abandon the transformers on the  
40 property, did not fail to disclose them to the appropriate government regulatory agencies and did not fail  
41 to disclose the fact that they were full of PCE to the buyer of the property. TWC did not fail to disclose  
42

1 the information in its possession, or information that should have been in its possession, to the  
2 demolition contractors. TWC did not pick up the transformer or fail to check its fluid levels. TWC did  
3 not break open the transformer. TWC did not present a closure report to the City of Sunnyvale falsely  
4 claiming the transformers were properly closed and TWC did not certify the closure without checking  
5 on the transformers.

6  
7 TWC did, at great expense, hire experts to investigate the property and report its findings to  
8 TWC prior to purchase. When the accident occurred, and every other entity related to the transformer  
9 thought only of how to avoid legal liability, TWC stepped forward, and without any directives from a  
10 government agency, promptly reported the release to the neighboring daycare center, hired one of the  
11 largest hazardous materials remediation firms in the country, and followed up by hiring one of the top  
12 environmental consulting firms in the country. To date, TWC has spent in excess of \$1.5 million  
13 responding to an accident it did not cause.

14  
15 TWC is not in the hazardous materials handling business and had no reason, until this accident,  
16 to have any dealings with the Regional Water Board and its regulations. Since the accident, TWC has  
17 undertaken all investigative and remedial activities required at the site well ahead of any Board directive  
18 or schedule. It is unfair and unlawful for TWC be fined on top of everything else it has endured. It adds  
19 insult to injury, particularly when there are other culpable parties.

#### 20 **ESSENTIAL ALLEGATIONS**

- 21  
22 **(1) Name, address, telephone number and email address of the Petitioner:** TWC  
23 Storage, LLC, Attn: Jack May, 420 Maple Street, Redwood City, CA 94063. Please send  
24 all correspondence regarding this petition to Jeffrey S. Lawson, Silicon Valley Law  
25 Group, 25 Metro Drive, Suite 600, San Jose, CA 95110. The telephone number is (408)  
26 573-5700 and email address is jsl@svlg.com.

- 1           **(2) The action of the Regional Water Board being petitioned including a copy of the**  
2           **action being challenged:** A copy of the Order Setting Administrative Civil Liability is  
3           attached hereto as: Attachment A.
- 4           **(3) Date of the Regional Water Board action:** The Regional Water Board took its action  
5           to adopt the ACL order on May 10, 2006. Counsel for Petitioner received the Final  
6           Division Decision on May 15, 2006.
- 7           **(4) Statement of Reasons Why The Regional Water Board's Action Was Inappropriate**  
8           **or Improper:** The issuance of the Order Setting Administrative Liability No. R2-2006-  
9           0030 dated May 10, 2006 was not within the authority of the Regional Water Board,  
10          inappropriate or improper, or not supported by the record, for the following reasons:  
11          1. The Board did not have sufficient evidence in the record to support its burden of  
12             proof on each element of each allegation.  
13                 a. There was no evidence TWC actually caused or permitted the accident.  
14                 b. The Board Order improperly incorporated the entire prosecutorial staff report  
15                    instead of making findings based on a preponderance of the evidence  
16                    introduced at the hearing. On many finding of the order, there was no  
17                    evidence or insufficient evidence to make the appropriate conclusions.  
18          2. The Regional Water Board exceeded its legal authority by:  
19                 a. Finding TWC directly liable for the work of independent entities working  
20                    within their scope of expertise.  
21                 b. Imposing multiple fines under separate statutory sections for the same  
22                    offense.  
23                 c. Misapplying Water Code §13264 to an accidental spill.  
24          3. The Board violated TWC's due process rights to a fair hearing by:  
25                 a. Ignoring TWC's uncontested evidence that it satisfied the requirements of at  
26                    least one of the statutory defenses found at §§13350 (c)(3)(4) and (5).  
27          4. The Board violated TWC'S due process rights to a fair hearing by using as its  
28             prosecuting attorney the same attorney who was advising the Regional Board that

1 same day on other Board matters. Furthermore, the Board during the TWC ACL  
2 hearing often consulted the prosecuting attorney rather than the Board's separate  
3 legal advisor.

4 5. The legal advisor improperly instructed the Board on the law regarding the burden of  
5 proof, the elements and applicability of the violations, and the elements and  
6 applicability of TWC's defenses.

7 6. The Board did not properly apply the statutory penalty factors and the State Water  
8 Board's Enforcement Policy. Rather, the Regional Water Board simply incorporated  
9 the prosecutorial staff report despite evidence that said report was biased and not  
10 based on all evidence available in the administrative record.

11 As of the time of the drafting of this Petition, the record and transcript had not been delivered to  
12 TWC. For that reason exact citations to the transcript and evidence produced at the hearing is  
13 impossible. Accordingly, for the State Water Board's convenience certain documents are attached  
14 hereto. TWC reserves the right to add additional reasons for this Petition upon receipt of the record and  
15 transcript.

16 (5) **How the Petitioner is Aggrieved:** TWC has been improperly found in violation of two  
17 water code sections and fined \$25,000.

18 (6) **Specific Action by the State Board That Petitioner Requests:** TWC respectfully  
19 requests that the State Board determine that the Regional Board's Order was  
20 inappropriate and improper, dismiss the ACL order, and make the following  
21 determinations:

- 22 1. TWC is not liable for administrative civil penalties because it did not actually cause or  
23 permit the accident;
- 24 2. TWC is not liable for the administrative civil penalties because it has complete  
25 defenses under §§13350(c)(3)(4) or (5);
- 26 3. TWC is not liable under §13264 because a Report of Waste Discharge (ROWD) is not  
27 required under these circumstances.
- 28 4. TWC is not liable because the Regional Board violated TWC's due process rights by:

1 (a) having the attorney who was actually advising the Board that day, also act as the  
2 attorney for the prosecuting team; (b) receiving incorrect guidance from the legal  
3 advisor; and (c) not making independent findings based on the preponderance of the  
4 evidence submitted at the hearing, but rather incorporating the entire prosecutorial  
5 staff report into the order.

6 5. TWC is not liable because proper application of the penalty factors would result in no  
7 penalty.

8 6. The Regional Board improperly found that an owner can be strictly liable for penalties  
9 based on activities by independent contractors working within their own area of  
10 expertise.

11 7. The Regional Board improperly imposed multiple penalties based on different  
12 sections of the Water code resulting in a double penalty in violation of the United  
13 States Constitution.

14 **(7) Statement of Points and Authorities in Support of Legal Issues Raised in the**  
15 **Petition.**

16 **A. Facts.**

17 1. The Property Purchase.

18 TWC Storage, LLC ("TWC") manages and develops real estate for a wide variety of projects.  
19 Until now TWC has never been in the hazardous materials business or involved in violations of  
20 hazardous materials laws.

21 On March 1, 2004, TWC entered into a contract to purchase 1165 East Arques Ave., Sunnyvale,  
22 ("Property") from Sunnyvale Community Services. The real owner of the Property was Advanced  
23 Micro Devices, Inc. ("AMD") and TWC's negotiations were with AMD, however, in order to create a  
24 tax benefit for AMD, AMD chose to sell the Property through a non-profit corporation. The Property is  
25 on a federal Superfund site overseen by the Board. By agreement the historical soil and groundwater  
26 contamination remained AMD's responsibility.  
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1 The Property had previously been owned by Monolithic Memories, Inc. ("MMI"), and used as  
2 part of its semiconductor manufacturing business. AMD purchased MMI in the 1980's becoming  
3 MMI's corporate successor and the owner of the Property. AMD closed the facility in 1989. At that  
4 same time AMD vacated the Property and it remained vacant until demolished in 2005.

5  
6 As part of the sale AMD was obliged to produce to TWC copies of all non-privileged  
7 environmental reviews, site assessments, soil tests and engineering studies for the Property,  
8 correspondence with consultants relating to the environmental conditions, correspondence with  
9 regulatory agencies, and all other documents related to the condition of the Property. Pursuant to its  
10 obligations under the sale contract, AMD made available to TWC 8-10 file cabinets full of  
11 environmental related documents to TWC.

12  
13 Not one document produced by AMD mentioned that there was a transformer filled with PCE on  
14 the Property. The only above ground hazardous materials identified in the 8-10 file cabinets were  
15 asbestos in the floor tiles and luminescent material in the exit signs.

16  
17 Prior to closing, TWC and its consultants thoroughly inspected the Property themselves and with  
18 representatives of AMD at least two times. AMD and TWC's representatives walked the Property to  
19 identify any and all hazardous conditions. In these property walk-throughs the only above ground  
20 hazardous materials AMD identified were asbestos in the floor tiles and luminescent material in the exit  
21 signs; no mention was made of any non PG&E transformers containing hazardous materials either above  
22 or below ground.

23 The only transformers on the Property that were disclosed by AMD were PG&E transformers.  
24 In regard to the PG&E transformers, TWC arranged with PG&E to properly close and remove the  
25 PG&E transformers. PG&E was asked if they had any other transformers on site and PG&E  
26 emphatically said "no".  
27  
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1 Also, prior to purchase, TWC conducted an expensive environmental due diligence investigation.  
2 The environmental investigation followed the EPA approved ASTM E-1527-00 standard (TWC-178),  
3 using an internationally recognized environmental consulting firm, Clayton Group Services, a Bureau  
4 Veritas Company ("Clayton"). Clayton is one of the top firms in the United States for performing Phase  
5 I environmental investigations. The investigation of the Property by Clayton was so thorough that the  
6 cost for the Phase I environmental assessment was approximately double the average cost of a Phase I  
7 environmental assessment. AMD made it clear that any and all documentation on the site was in the 8-  
8 10 file cabinets that they provided, and that by studying these files Clayton would have all of the  
9 information that AMD had regarding the site.  
10

11 An item specifically within the scope of the Clayton Phase I investigation was to look for the  
12 presence of transformers that contain hazardous materials. (TWC-178). Clayton specifically looked for  
13 any transformers that needed to be evaluated as an environmental hazard. As provided for in the ASTM  
14 standard, Clayton can rely on reports by other environmental professionals. (ASTM E-527-00 section  
15 6.5.2.1) In this case AMD provided to TWC a C.H.A.S.E. report dated February 9, 1990, (TWC-1-  
16 169) that documented the closure of the AMD's 1165 Arques Ave. facility. Of particular note, is that  
17 the C.H.A.S.E. report, (TWC-8), certifies that the Property is closed except for certain specified  
18 exceptions. The Energy Center (which is the area where the PCE transformers were eventually found)  
19 was not excepted.  
20

21 The C.H.A.S.E. report showed that no energy related chemicals remain in the Energy Center.  
22 (TWC-123) Indeed the C.H.A.S.E. report is so thorough that it lists the 150 gallons of tower treatment  
23 chemicals stored in the closed Energy Center that are used in the AMD groundwater extraction system  
24 treatment towers to prevent scaling. Consistent with a properly emptied and closed equipment there was  
25 no hazardous materials warning placard on the transformers left in the Energy Center. (TWC-532)  
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1 In addition to onsite investigations and a review of the documents produced by AMD and  
2 interviews with AMD representatives, Clayton checked with the governmental agencies who have  
3 jurisdiction over the Property to determine the past and present status of hazardous materials located on  
4 the Property. Clayton checked U.S. EPA files, Regional Board files, DTSC files, City of Sunnyvale  
5 files, (fire and building department files) and County Environmental Health. (TWC-184-191) Not one  
6 government agency had a record of the PCE filled transformers despite the fact that several laws  
7 required AMD to disclose the storage of Hazardous Materials. TWC-539. Accordingly, there was  
8 nothing in the regulatory record to indicate to Clayton that they could not rely on the C.H.A.S.E. report  
9 showing the Energy Center was properly closed.  
10

11 As a side note, it is important for the State Water Board to recognize that AMD, in fact, knew  
12 that it had a PCE transformer on the Property. Tom Delfino, a previous facilities manager for MMI,  
13 which was acquired by AMD, was interviewed after the accident occurred, Mr. Delfino informed  
14 Clayton that MMI had ordered the transformer and it was delivered by the vendor to MMI with the PCE  
15 in it, and placed in the Energy Center when it was built around 1984. The corporate knowledge of MMI  
16 is attributable to its corporation successor--AMD. For approximately 20 years MMI and thereafter  
17 AMD had an obligation to disclose to government agencies the presence of this hazardous material.  
18 TWC-539, 584, 590. Furthermore, when AMD abandoned the facility in 1989 it had an obligation to  
19 dispose of the hazardous materials in the Energy Center.  
20

21 Based on a thorough investigation of the site with qualified professionals and the information  
22 provided by the previous owner, TWC had no reason to believe that it would be encountering any above  
23 ground hazardous materials other than asbestos and luminescent exits signs. Toward that end, TWC's  
24 contractors specifically, adequately and legally dealt with the asbestos and luminescent exit signs.  
25

26 Finally, in reviewing the adequacy of TWC's investigation of the Property, the facts are that PCE  
27 is an extremely unusual material to find in a transformer. In the early 1980s when MMI was purchasing  
28



1 these transformers, the transformer industry was in the process of moving away from the use of PCBs as  
2 a dialectic fluid. The company that MMI chose to buy its transformers from had not yet made the  
3 transition to mineral oil, and for a short period of time that transformer vendor experimented with PCE  
4 in transformers. Not one person responding to the accident had ever heard of a PCE filled transformer  
5 before.

## 6 7 2. The Accident and Immediate Response.

8 With the consent of AMD, TWC hired Qualogy Construction Inc. ("QCI") to demolish the  
9 purportedly closed and abandoned structures on the Property. QCI held project meetings with AMD and  
10 TWC as AMD was interested in having QCI do their demolition work as well. At no time during those  
11 meetings did representatives of AMD warn QCI of even the potential that tanks full of PCE remained in  
12 the closed Energy Center. Rather, AMD stated repeatedly that the asbestos and luminescent exits signs  
13 were the only remaining hazardous materials of any concern to the demolition workers.

14  
15 On July 15, 2005, a subcontractor of QCI, Campanella Construction Company ("Campanella"),  
16 was in the process of removing the 15-20 pieces of old electrical equipment in the purportedly properly  
17 closed Energy Center. There was nothing to indicate that the old rusty abandoned transformer should be  
18 treated in any way different from the other old rusty abandoned equipment in the Energy Center.  
19 Because the contractor had been informed by AMD that all hazardous materials had been removed from  
20 the site, Campanella picked up the transformer with the excavator. Upon lifting the transformer into the  
21 air Campanella discovered liquid draining from the bottom of the transformer. The surprised operator  
22 moved the transformer away from the daycare center and placed the transformer to drain within what  
23 appeared to him to be an existing concrete containment area on top of a pile of soil and other  
24 construction debris, which he believed, would absorb and contain the material until its nature was  
25 determined. In an attempt to curtail the problem the operator later relocated the transformer to another  
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1 concrete containment area. Campanella called QCI and a principal of QCI immediately drove to the  
2 site.

3 Although TWC has several real estate investments, its operation on the west coast consists of a  
4 small office in Redwood City with two employees. On July 15, 2005 the employee responsible for this  
5 development, Mr. Jack May was in Santa Rosa at a business meeting. Upon being informed by QCI that  
6 there had been an accident with the transformer, Mr. May immediately called AMD and PG&E to  
7 determine the nature of the liquid.  
8

9 QCI also contacted AMD on the morning of July 15 and requested a contact name for an  
10 environmental company to respond to the spill. AMD told QCI to call Ecology Control Industries  
11 ("ECI"). However, ECI was unresponsive and rather than wait, QCI elected to immediately find another  
12 clean up company. QCI called around and found a safety manager who recommended Clean Harbors,  
13 Inc. (the largest environmental clean up company in the United States). That same day QCI called  
14 Clean Harbors to retain them to handle the response.  
15

16 Meanwhile at the Property AMD representatives arrived, took pictures and performed some  
17 sampling, they also directed that the spill area and the broken transformer be covered with plastic.  
18 AMD did not report the spill and did not contact the daycare center; rather AMD apparently became  
19 primarily interested in disclaiming any responsibility.  
20

21 Around noon on Friday July 15, 2006 a principal of QCI personally visited the Prodigy Child  
22 Development Center to inform them of the spill. Also on July 15, in the late afternoon, Mr. May also  
23 called Prodigy daycare to let them know there had been a spill.

24 On Saturday morning at 7:00 a.m., July 16, 2005, QCI met with Clean Harbors' emergency  
25 response team and ordered the delivery of equipment to start the removal of the contaminated material  
26 as soon as possible. On Sunday morning, a backhoe and two hazardous material roll off bins were  
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1 delivered. Clean Harbors began placing contaminated soil and debris into the roll off bins until the  
2 backhoe broke. Clean Harbors then continued with hand excavation for the remainder of the day.

3 By Monday morning, July 18, 2005, Clean Harbors had completed the majority of the  
4 contaminated soil/debris removal. QCI then instructed Clean Harbors to pump out the second  
5 transformer and dispose of the liquids. Clean Harbors continued to work throughout the day.

6 On Monday July 18 QCI obtained an OES release reporting form, which they emailed to TWC.  
7 TWC filled out the form and attempted to fax it, but there was a problem with the fax machine and the  
8 fax was not successfully transmitted.

9 On July 19, 2005, QCI met again with Clean Harbors to review the remediation progress. By  
10 that time Clean Harbors had completed all the debris removal as well as completed pumping out the  
11 second transformer and removing all liquids from the broken transformer. On July 19, 2005 TWC  
12 telephoned EPA and informed them of the release. TWC told EPA that they had retained Clean Harbors  
13 and EPA did not recommend TWC call any other agencies.

14 On July 19, 2005 an inspector from the City of Sunnyvale visited the site and was informed that  
15 Clean Harbors had been retained and was undertaking the clean up. The inspector informed QCI that  
16 the City of Sunnyvale should be notified when accidents such as this occur. Thereafter the inspector  
17 supervised the activities on the site. The inspector found the work was proceeding satisfactorily,  
18 although the inspector did require additional site security which was immediately implemented.

19 On July 22, 2005 additional material was found on the Property and the City of Sunnyvale was  
20 immediately called and directed the remediation activity.

### 21 3. The Investigation and Clean Up.

22 TWC repeatedly requested AMD step up to its obligations to respond to the spill from the  
23 transformer, however AMD repeatedly refused to accept any responsibility. In light of the abandonment  
24 of responsibility by AMD, TWC made the prompt decision to go forward and fully respond to the  
25

1 release without delay and leave the eventual legal allocation of responsibility to a later date. With that  
2 decision made TWC called Clayton that same week to undertake an investigation and remediation of the  
3 site without any delay and without waiting for any regulatory order.

4 Clayton assigned John Werfal as project manager and Clayton immediately began an  
5 investigation on the Property. Mr. Werfal testified at the Regional Water Board hearing regarding his  
6 activities on the site. As soon as Clayton determined what investigation and remediation needed to be  
7 done, it informed Staff of the planned investigation and remediation and commenced work. The  
8 procedure Clayton used is the professionals at Clayton would first decide what needed to be done, then  
9 they would tell Staff and Staff would at a later date send an approval of the work plan and setting an  
10 agreed upon deadline. In every instance Staff agreed with Clayton's proposals and Clayton completed  
11 the work well ahead of the deadline.

12  
13 Since the accident, TWC and Clayton have conducted; an extensive sampling program, two large  
14 excavations, indoor air testing of the Daycare Center, installation of a soil vapor extraction system and  
15 an extensive in-situ chemical oxidation program. Throughout this process TWC has kept the Daycare  
16 Center staff up to date on all activities.

17  
18 On January 27, 2006, after TWC had spent over \$1.5 million in responding to the release caused  
19 by the undisclosed and unlawfully abandoned transformer, Staff issued an Administrative Liability  
20 Complaint for the accidental discharge of Perchloroethylene (PCE). This complaint was issued without  
21 any Notice of Violation and without any opportunity to meet with Staff to discuss whether further  
22 enforcement or an ACL complaint was justified.

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24 All of the above factual statements are based on documents or testimony in the Regional Water  
25 Board administrative record.  
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1           **B. The Board Order must be supported by a preponderance of the evidence.**

2           Due process requires the government prove each element of an offense. (*Apprendi v. New*  
3 *Jersey*, (2000) 530 U.S. 466.) A party bears the burden of proving each fact, the existence or non-  
4 existence of which is essential to the claim for relief he is asserting. (Evid C. Section §500)  
5 Administrative agencies adjudicating liability must make findings based on a preponderance of  
6 evidence. (Cal.Jur. Admin Law §526)  
7

8           **C. The Administrative Civil Liability Order Does Not Correctly Apply the Water Code.**

- 9           1. The ACL confuses the Board's authority to protect water quality vs. its authority to  
10           impose penalties.

11           The Board has two separate categories of authority it may exercise. The most common exercise  
12 of Board authority relates to its power to hold entities as responsible parties for the purposes of  
13 investigation and remediation of waste discharges. In this area, Boards have very broad powers in order  
14 to effectuate the statutory purpose of protecting water sources. The Board's power in this area rests in  
15 common law concepts of nuisance. (*Modesto RDA v. Superior Court*, (2004) 119 Cal. App.4<sup>th</sup> 28  
16 "*Modesto*") In effect, the Board's power follows the CERCLA statutory scheme, which holds owners  
17 and operators of property and facilities strictly responsible for discharges. In this capacity, Boards may  
18 hold tenants, property owners, operators, contractors, liable as dischargers for the purpose of requiring  
19 remediation. (*Zoecon Corporation*, RWCQB Order No. WQ86-11, citing *Rowland v Christian* (1968) 69  
20 C.2d 108. "*Zoecon*") However, even where its power is at it its zenith in ordering investigation and  
21 remediation the Board recognizes that the party actually causing the release should be held liable first.  
22 (See *In the matter of San Diego Unified Port District*, Order No. WQ90-3) Owners are secondarily  
23 liable to actual polluters.  
24

25  
26           A separate exercise of Board authority applies to imposing penalties. Different principles of law  
27 and policy apply to this exercise. Penalties under the Water Code are not related to paying for an  
28 investigation or clean up or compensating the government for its damages. (*RWQCB v. U.S. Navy*

1 (1973) 371 F. Supp 82, 85) Rather, the purpose of these penalties is to punish; deter future violations by  
2 the entity involved; and to deter others from violating Board directives. (*U.S. v. Halper* (1989) 490 U.S.  
3 435, 448 overruled on other grounds by *Hudson v. U.S.* (1997) 522 U.S. 93, 101-102. "*Halper*")

4 *Halper* establishes that when a civil penalty serves only to punish, imposing civil and criminal  
5 penalty for same act violates due process. *Halper* focused on whether the civil penalty, as applied,  
6 served only a punitive purpose. In this case, the Board's purpose for the proposed double penalties (for  
7 failure to file a report of waste discharge and for the spill) is solely to punish. The facts make the  
8 Board's purpose clear. The purpose cannot be to encourage investigation and remediation, TWC is  
9 already investigating and remediating. The purpose cannot be to compensate the government because  
10 the Board is already receiving repayment of its oversight costs. The punitive purpose is evident from  
11 Staff's admitted reason for applying a "per day" rather than a "per gallon" penalty, which was because  
12 the "per day" penalty yielded a higher penalty. (Letter dated March 16, 2006 from Yuri Won to Jeffrey  
13 Lawson.) Double charging demonstrates a punitive purpose.

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16 The Board member's statements on the record at the hearing show that the purpose was to punish  
17 and at the hearing the prosecution never denied that the point of the penalties was to punish.  
18 Accordingly, a general analysis of the purpose of the penalty is not required. The penalties, as applied  
19 to TWC by the Board, are solely for punishment and the due process rules for punishment apply.

20  
21 In the exercise of penalty authority, it is inappropriate for the Board to punish a party who did  
22 not actually and factually commit the violation there was no evidence submitted by the prosecution that  
23 TWC actually caused or permitted the accident. Rather the entire case was based on mere property  
24 ownership. Punishing a party simply based on property ownership, without more, violates constitutional  
25 protections and does not effectuate any legitimate purpose for punishment. Indeed, it diminishes the  
26 value of a penalty because it indicates that punishment is based on arbitrary reasons unrelated to any  
27 actual wrongdoing. Furthermore, one of the factors to be considered in ascertaining the appropriateness  
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1 of multiple penalties is determining the conduct to be prohibited by the statute. (United States v. UCO  
2 Oil Co., 546 F.2d 833 (9<sup>th</sup> Cir. 1976)) Here, the Water Code does not prohibit property ownership but  
3 illegal discharge. Yet the Board is imposing penalties against TWC based solely on TWC's ownership  
4 of the Property.

5 Although "discharger" under California water law has never been fully or adequately defined, it  
6 is clear that when imposing penalties there is an obligation on the accuser to name the correct party-the  
7 party who actually caused the release. Similar Federal law reaches the same conclusion. The Clean  
8 Water Act does not impose liability for a third party's failure to comply with the environmental  
9 standards. (*Love vs. New York State Department of Environmental Conservation* 529 F Supp 832, 841  
10 (1981)) Due process requires that for assessing a penalty the Board must name the actual discharger  
11 and not just any entity connected to the property where the release occurred. Yet here the Board  
12 penalized the party most attenuated from the act that caused the release and without any investigation,  
13 analysis or explanation did not name AMD, QCI or Campanella.

14 The error in imposing penalties against TWC is in part caused by the confusion regarding the  
15 dividing line between the two areas of Board authority as set forth in the two different provisions of law.  
16 The rules for imposing civil penalties are substantially different from those that apply to investigation  
17 and remediation. Although TWC has a legal relationship to the property as the property owner and  
18 developer, that only exposes it to the Board's authority regarding investigation and clean up matters.

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22 2. Multiple Penalties for one spill on one day violate judicial maxims of fundamental  
23 fairness, the double jeopardy clause of the Fifth Amendment of the Constitution and  
24 the prohibition against excessive fines in the Eighth Amendment of the Constitution.

25 By imposing a penalty under two sections of the Water Code for the same activity, the Board  
26 violates judicial precepts of fundamental fairness as well as the Constitutional prohibitions against  
27 double jeopardy and excessive fines. This is not a situation where there was a discharge from a pipe or  
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1 point source over several days or weeks. When Campanella picked up the transformer it ruptured.  
2 This was a single isolated event that occurred on one day. Testimony in the record supports this  
3 conclusion. No evidence submitted at the hearing disputes this point.

4 A defendant has a due process right to be protected against multiple punishments for the same  
5 act. For at least 60 years, the federal courts have presumed that Congress does not intend a defendant to  
6 be cumulatively punished. (*Whalen v. United States*, (1980) 445 U.S. 684, 691-693.) Both the  
7 multiplicitous criminal punishment and civil double recoveries offend that sense of fundamental  
8 fairness, which lies at the very heart of due process. (*Troensgaard v Silvercrest Industries, Inc.* (1985)  
9 175 Cal.App.3d 218.) As the court in Silvercrest pointed out:

11 A defendant has a due process right to be protected against unlimited  
12 multiple punishment for the same act. A defendant in a civil action has a  
13 right to be protected against double recoveries not because they violate  
14 'double jeopardy' but simply because overlapping damage awards violate  
15 that sense of 'fundamental fairness' which lies at the heart of  
16 constitutional due process. (Id. at p.228, emphasis added.)

17 The United States Supreme Court has held that the double jeopardy clause protects against three  
18 distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution  
19 for the same offense after conviction, and (3) multiple punishments for the same offense. (*United States*  
20 *v. Halper*, (1989) 490 U.S. 435, 440, overruled on other grounds by *Hudson v. United States* (1997) 522  
21 U.S. 93, 101-102.)

22 The Water Code is not immune from these basic tenets of due process. The *Halper* and *Hudson*  
23 cases lay out a multi-factor analysis for determining when civil actions implicate the constitutional  
24 protections against double jeopardy. That is far more work than the Board needs to undertake in this  
25 matter. As explained above the incontrovertible purpose of the proposed penalties in this case is solely  
26 to punish. The attempt to punish under two Water Code sections and for four days for what in reality  
27 was one act on one day on its face offends fundamental fairness, and implicates both the double  
28 jeopardy and excessive fines clauses of the United States Constitution. There is no reason put forth in



1 the ACL that justifies the Board taking such an aggressive and legally risky position.

2 3. The §13264(a) Waste Discharge Requirements violation is inappropriate for an  
3 accidental spill.

4 The Order imposed two separate violations for one accident. The first alleged violation is for  
5 Water Code §13264(a), "Waste Discharge Requirements" which provides:

6 No persons shall initiate any new discharge of waste or make any material  
7 changes in any discharge, or initiate a discharge to be, make any material  
8 changes in a discharge to, or construct, an injection well, prior to the filing  
9 of a report required by §13260 and no person shall take any of these  
10 actions after filing the report but before whichever of the following occurs  
11 first: (1) The issuance of a waste discharge requirements pursuant to  
12 §13263; (2) The expiration of 140 days after compliance with §13260 if  
13 the waste to be discharged does not cause or threaten to create a condition  
14 of pollution or nuisance and any of the following applies: [CEQA  
15 Requirements]; (3) The issuance of a waiver pursuant to §13269.  
(Emphasis added)

16 It is clear that §13264(a) applies only to planned discharges and requires obtaining a permit or a  
17 waiver prior to a planned discharge. It is entirely inapplicable and inappropriate to accidental  
18 discharges. Article 4 of the Water Code (Waste Discharge Requirements) only applies to ongoing and  
19 planned waste discharges and permit violations. A basic review of the WDR statutory scheme  
20 demonstrates this. Article 4 includes: (1) a detailed annual fee system; (2) provisions for adoption of  
21 waste discharge requirements; (3) certain exemptions from permit requirements; (4) pollution prevention  
22 plans; (5) injection wells; (6) effluent limitations, etc. These all relate to ongoing and planned  
23 discharges. Nothing related to Waste Discharge Requirements are applicable to this accident and that  
24 allegation should be dismissed.

25 A copy of the ROWD form is attached hereto. It was undisputed that the ROWD form requires a  
26 lengthy response. The facts are it would take weeks to prepare the response. A sample UST release  
27 report form is also attached to show what a real, accidental release report form looks like. There is  
28 nothing in the ROWD form that shows it applying to an accidental release. The total inapplicability of

1 the ROWD process is shown by the fact that the Board to this day has never asked for an ROWD from  
2 TWC. Why not? Because it does not apply.

3 The Regional Water Board has no authority to enforce the Office of Emergency Services (OES)  
4 reporting requirements. The District Attorney does and chose not to prosecute. A report to OES is  
5 completely irrelevant to a ROWD and it would be nonsense to expect that a discharger could avoid a  
6 legitimate ROWD requirement by filing the OES Form. See Attachments, E, F, D and G. Finally, a  
7 ROWD can only apply if the alleged discharger knows there was a release to groundwater. Here, this  
8 was a surface spill and there was no reason to believe groundwater would be impacted. The evidence is  
9 TWC testified it did not know there was a release to groundwater and the Board has no evidence  
10 indicating that TWC knew of a release to groundwater. So there was no basis to file a ROWD.

11  
12 **D. TWC Is Not Liable Under §13350(b)(1).**

13  
14 1. Only §13350(b)(1) Applies To Accidental Spills.

15 The second alleged violation is of Water Code §13350(b)(1), which provides:

16 Any person who, without regard to intent or negligence, causes or permits  
17 any hazardous substance to be discharged in or on any of the waters of the  
18 state, except in accordance with waste discharge requirements or other  
19 provisions of this division, shall be strictly liable civilly in accordance  
20 with subdivisions (d) or (e).

21 This is the appropriate section for prosecuting accidental, not WDR, related discharges.

22 2. The Board may only impose penalties on the party that “caused” or “permitted” the  
23 discharge.

24 To impose penalties on TWC as “the discharger”, the Board must do more than simply show that  
25 TWC owns the property. The relevant inquiry is whether TWC “caused...any waste to be  
26 discharged...into the waters of the state...”. The answer is clearly no. TWC neither caused nor  
27 permitted any waste to be discharged within the meaning of the Water Code. Legal cause is established  
28 only when the act is directly connected with the resulting injury, with no intervening force operating. (1

1 Witkin & Epstein, Cal.Criminal Law (3 ed. 2000) Elements, § 36, p. 242.) The courts have agreed,  
2 stating that liability under §13350(b) does not extend to parties who's involvement is remote and  
3 passive. (*Modesto* p.43) TWC had no active involvement in the demolition activities.

4 Similarly, to impose penalties for "permitting" a discharge the Staff must produce a  
5 preponderance of the evidence (and here they have none) showing how TWC permitted Campanella to  
6 have the accident. On cross-examination at the hearing, Staff produced no evidence showing that TWC  
7 caused the accident. Indeed all they could do is make the gratuitous remark that TWC should have hired  
8 a better contractor. But they had no evidence that QCI was unqualified or that TWC caused the accident  
9 by failing to investigate the contractor's qualifications. The facts are that both TWC and AMD  
10 investigated the contractor and found it satisfactory.

11  
12 There is no evidence that TWC permitted the release by undertaking an inadequate pre purchase  
13 investigation, hiring unqualified contractors or consultants, inadequate project oversight etc. The proof  
14 for causing or permitting is essentially the same and in either instance the facts support TWC; not the  
15 allegations in the ACL. There is no evidence proving any facts showing any act or inaction by TWC  
16 that caused or permitted the accident. The burden of proof for the element of "causing or permitting"  
17 was on the prosecutorial staff and they submitted no evidence on this point. Mere ownership is not an  
18 act-it is a status. The Order ignores this point.

19  
20  
21 3. The Board Order ignored the Section 13350 defenses.

22 The legislature had no intent to hold parties liable for discharges that were not their fault  
23 and provided traditional defenses to the imposition of a penalty. Water Code §13350(b)(1) sets forth  
24 several defenses at subdivision (c):

- 25 (1) [An act of war]  
26 (2) [A natural disaster]  
27 (3) Negligence on the part of the state, the United States, or any department or agency  
28 thereof; provided that this paragraph shall not be interpreted to provide the state, the  
United States, or any department or agency thereof a defense for liability for any  
discharge caused by its own negligence.

- 1 (4) An intentional act of a third party, the effects of which could not have been prevented  
2 or avoided by the exercise of due care or foresight.  
3 (5) Any other circumstance or event which causes the discharge despite the exercise of  
4 every reasonable precaution to prevent or mitigate the discharge.

5 The defenses found at §13350(c)(3), (4) and (5) provides a complete defense if a discharger was  
6 not negligent, or in other words, used due care, or if another entity's acts intervened or if penalties  
7 would be unfair under the circumstances. *City of Brentwood vs. Central Valley Regional Water Quality*  
8 *Control Board* 123 Cal.App 4th 714 (2004) explained that the genesis of the exceptions to liability under  
9 the Water Code are based on criminal cases and also apply to civil liability as an affirmative defense.  
10 (Pg. 726) Philosophically the defenses are based on the concept that if the release is caused by  
11 circumstances outside a reasonably cautious defendant's control then there should be no liability (Pg.  
12 726) In short, penalties are not to be imposed without proof of wrongdoing.

13 4. AMD's failure to disclose the hazardous materials in the Energy Center and failure to  
14 properly close the Energy Center constitutes a complete defense under §13350(c)(4)  
15 and the common law.

16 Even if TWC did "cause" the accident, which it did not, an unforeseeable intervening act of a  
17 third party cuts off the chain of causation. (*People v. Armitage*, (1987) 194 Cal.App.3d 405, 410-421.)  
18 Therefore, even if Board Staff could show, which they cannot, that TWC somehow caused the  
19 discharge, TWC's causation is superseded by several unforeseeable acts regarding the PCE transformers  
20 illegally left on the site. This is a traditional tenet of American jurisprudence (*Nunn v. State*, (1982) 137  
21 Cal. App.3d 790) and explicitly provided for in §13350(c)(4).

22 The legal advisor improperly and advised the Board without citation to any legal authority or any  
23 supporting language in the statutes that an intervening act must occur in time after TWC acted and that  
24 this defense did not apply. No case law or statute supports the legal advisor's instruction. The hearing  
25 was closed at that point and no argument by counsel for TWC was allowed. There is no requirement  
26 that an intervening act have a temporal place in the chain of causation.  
27  
28

1 AMD/MMI intentionally purchased and installed the transformers. It is beyond dispute that the  
2 Water Code accepts that a person should not be held liable for the intervening acts of others, and that is  
3 based on the legislature's acceptance of long standing common law concepts. Intervening illegal  
4 conduct is not the type of conduct a party is required to consider in establishing its own due care. A  
5 defendant's conduct is superseded as a legal cause of injury if the intervening force is unusual,  
6 extraordinary, or not reasonably likely to happen and is therefore not foreseeable. (Restatement (Second)  
7 of Torts § 442(b,c).) (*People v. Armitage*, (1987) 194 Cal.App.3d 405, 410-421.) there is no temporal  
8 aspect to this analysis  
9

10 The failure of AMD to comply with Hazardous Materials Business Plan requirements, chemical  
11 hazardous materials storage requirements, notification requirements and closure requirements, as well as  
12 its failure to disclose to the buyer or the demolition contractors are intervening acts by a third party, the  
13 effect of which could not have been prevented or avoided by the exercise of due care or foresight within  
14 the meaning of Water Code §13350(c)(4). Indeed, the intervening acts are something that AMD could  
15 have been held criminally liable for under H & S C sec 25190, 25189.6(a)(b); Sunnyvale Fire Code sec  
16 16.52.503; 42 U.S.C. sec 6928.  
17

18 5. The negligence of the City of Sunnyvale in certifying the closure of the Energy  
19 Center constitutes a complete defense under §13350(c)(3).  
20

21 The actions of the City of Sunnyvale excuse TWC's liability, if any, within the meaning of  
22 §13350(c)(3) because the City was negligent in failing to actively implement and enforce its hazardous  
23 materials closure requirements against AMD. If the illegality of the transformer was as easy to detect as  
24 the ACL alleges then the City inspector was negligent in certifying the closure. It was this negligence  
25 that allowed the transformers to go undetected for 19 years. TWC reasonably relied on the City's  
26 certification of AMD's closure. If the City had not been negligent, the presence of this transformer  
27 would have been known and this release would have been avoided.  
28

6. TWC is not liable under §13350(c)(5) because TWC took all reasonable precautions.

The Board did not properly consider the facts regarding the circumstances of the demolition. The facts are that: (1) the contractors had been specifically informed by AMD that all hazardous materials had been removed; (2) AMD had disclosed the C.H.A.S.E. closure report and the Energy Center was accepted by the City as closed; (3) the operator had already pulled out several pieces of the Energy Center without incident; (4) The equipment was all old, abandoned and rusty consistent with a closed facility; (5) If the transformers had been drained they still would have had "Perclene" stenciled on them (contrary to the assertion in the ACL that the contractor should have known what "Perclene" is, in fact no one knew what "Perclene" was and PCE is virtually unknown in transformers); and (6) there was no hazardous materials warning placard on the equipment.

The Regional Board Order improperly relies on evidence that the demolition permit placed special conditions upon TWC that placed TWC under a higher duty of care. This is a substantial error. The Regional Board never saw the demolition permit and it was not produced by the prosecutorial staff to TWC. In fact, the permit only related to dust control. The permit had nothing to do with hazardous materials illegally stored on the property or the transformer.

The Board had no evidence regarding the standard of care for a demolition contractor. There is nothing in the ACL, or the documents produced by Board Staff, documenting any evidence regarding the demolition contractor's standard of care. There is no opinion by experts in demolition contracting, or citation to any guidance for demolition contractors, or even a witness statement that says the demolition contractor was negligent! The Board never received a copy of the demolition permit.

The evidence is TWC took reasonable precautions within the contemplation of §13350(c)(5).

**E. The Action Does Not Comply With State Water Board Enforcement Policy.**

Prior to issuing the ACL the Board took no steps to fully investigate the facts or to identify the actual discharger in accordance with State Water Resources Control Board resolution No. 92-49, B, and

1 its own enforcement policies. The Board made no effort to resolve this matter informally prior to the  
2 filing of the Complaint. In violation of its own enforcement policy procedures, the Board did not  
3 attempt to phase or “escalate” its enforcement efforts by first issuing a Notice of Violation to give TWC  
4 (even though not the discharger in this instance) an opportunity to correct the violation prior to  
5 commencing formal enforcement. (See, *Guidance, supra*, Section “A. INFORMAL  
6 ENFORCEMENT.”)

7  
8 **F. The Regional Water Board Did Not Properly Apply The Penalty Factors.**

9 Section 13327 of the Water Code requires the Board to consider ten factors when determining  
10 penalty amounts and whether an ACL should be issued at all. (§13327; see also, *Guidance to*  
11 *Implement The Water Quality Enforcement Policy*, April 1996, Amended September 18, 1997, Section  
12 IV (B))

13  
14 Virtually every factor is in TWC’s favor, yet the staff proposed the maximum penalty. The  
15 Board is required to consider the statutory factors and general principles of equity when making a  
16 determination with regard to the issuance of an ACL or imposition of penalties. It must make specific  
17 findings for each factor. Simply incorporating the factually incorrect and biased prosecutorial staff  
18 report does not meet this standard.

19 Further, it is required to take into consideration all mitigating factors including a defendant’s  
20 lack of culpability and voluntary efforts to clean up. (*In the Matter of Jeanne McBride, SWRCB Order*  
21 *No.WQ87-9 (1987)*)

22  
23 In determining the amount of civil liability, the regional board, and the  
24 state board upon review of any order pursuant to Section 13324, shall take  
25 into consideration the nature, circumstances, extent, and gravity of the  
26 violation or violations, whether the discharge is susceptible to cleanup and  
27 abatement, and with respect to the violator, the ability to pay, the effect on  
28 ability to continue in business, and any voluntary cleanup efforts  
undertaken, any prior history of violations, the degree of culpability,  
economic savings, if any, resulting from the violation, and such other  
matters as justice may require. (Emphasis added) (Id. at p.8)

1 In particular, Staff has admitted that they did not follow any written agency enforcement policies  
2 in making their determination with regard to penalties, instead they stated that they used  
3 the calculation which would generate the highest penalty amount. (*Letter dated March 16, 2006 from*  
4 *Yuri Won to Jeffrey Lawson.*). No weight has been given to TWC's lack of culpability or its voluntary  
5 compliance, or the fact that it has no prior history of violations, or that it made its best efforts to discover  
6 all environmental hazards at this site prior to its purchase, or to the fact that AMD knew of the presence  
7 of this transformer yet failed to disclose it. If the Board had fairly considered each of these factors an  
8 ACL would never have been issued.

10 Even a cursory comparison of the Board's Enforcement policy with the facts of this case reveals  
11 the following that was not adequately addressed:

12 1. Nature, Circumstance, Extent, and Gravity of Violation and Degree of Toxicity.

13 *"These factors address the magnitude and duration of a violation. More*  
14 *fundamentally, they address the impact of a violation and its effect on*  
15 *beneficial uses, including public health and water quality. ...For spills,*  
16 *the main concern is the volume, duration and toxicity of the material*  
17 *spilled. ..."*

18 The Board gives little consideration to the circumstances surrounding this spill. No weight has  
19 been given to the fact that there was nothing TWC could do to avoid the accident; that TWC performed  
20 an extensive due diligence that cost twice as much as normal environmental assessments; or that it  
21 properly relied on closure certifications.

22 2. Degree of Culpability.

23 *"Higher ACL amounts should be set for intentional or negligent violations*  
24 *than for accidental, non-negligent violations. ...The test is what a*  
25 *reasonable and prudent person would have done or not done under*  
26 *similar circumstances."*

27 The Board completely failed to give this most important factor sufficient weight. Instead, the  
28 Board says that the spill was caused by an "operator error" that could have been prevented – a  
conclusion that flies in the face of the facts, then begs the question by saying the "Discharger" breached



1 its duty of ordinary care. It does not analyze why TWC and not more culpable entities are the  
2 “Discharger”. The Board has completely failed to establish any negligence on TWC’s part. It  
3 completely fails to provide any evidence regarding what TWC could have done to avoid the accident.  
4 The ACL and documents produced by the Board contain no evidence that a “reasonable and prudent  
5 person” would have done anything different. The evidence is TWC met its standard of care throughout  
6 these events.  
7

8 3. Prior History of Violations.

9 *“Higher ACL amounts should be set in cases where there is a pattern of*  
10 *previous violations. ...”*

11 The Board correctly found that TWC has no prior violations but given little weight, when it  
12 should be of the utmost importance in the evaluation.

13 4. Susceptibility to Clean up and Voluntary Clean up Efforts Undertaken.

14 *“The ACL amount should be reduced to reflect good-faith efforts by the*  
15 *violation to clean up wastes or abate the effects of waste discharges....”*

16 TWC made immediate and significant efforts to address this spill on the very day it occurred and  
17 the following four days. Nor does the Board give sufficient credit to TWC’s \$1.5 million spent on this  
18 matter or TWC’s complete cooperation.

19 5. Economic Savings.

20 *“Dischargers should not enjoy a competitive advantage because they*  
21 *flout environmental laws. ...”*

22 The Board correctly recognized that TWC recognized no economic savings. This was an  
23 accident and not an attempt to save money by “flouting the environmental laws.” Yet again, the Board  
24 gave little weight to this factor.  
25

26 6. Ability to Pay and Ability to Continue in Business.

27 *“Normally assessments are not set so high as to put firms out of business*  
28 *or seriously harm their ability to continue in business. ...Draft USEPA*  
*guidance provides one possible method for analyzing affordability. ....”*

1 TWC admitted it could pay the fine, but was opposing imposition of a fine because it would be  
2 unjust.  
3

4 **7. Other Matters as Justice May Require.**

5 *"This factor affords the Regional Water Board wide discretion. ...Finally,*  
6 *litigation considerations may justify a reduction in the amount due to*  
7 *applicable precedents competing public interest considerations, or the*  
8 *specific facts or evidentiary issues pertaining to a particular case."*

9 Having made no effort to ascertain the true facts or identify the actual discharger in this matter, it  
10 is clear that the Board failed to properly consider this factor at all.

11 **G. The Board Violated Due Process.**

12 TWC's due process right were violated by the Regional Board using on its prosecution team Ms.  
13 Yuri Won who also advised the Board during other agenda items on the very same day as the TWC  
14 hearing. Ms. Won had also been advising the Board in its April hearing. At the May hearing Ms. Won  
15 was at the table with Board Staff advising the Board prior to the hearing and then after the TWC hearing  
16 was over, she apparently continued to advise the Board on other matters that were before it that day.

17 It is unconstitutional under the holding of *Quintero vs. City of Santa Ana* (2003) 114Cal.App.4<sup>th</sup>  
18 810 for an attorney acting as a prosecutor to simultaneously act as an advisor to the Board even if the  
19 matters are unrelated. This principle was recently upheld by the Superior Court in *Morongo Band of*  
20 *Mission Indians vs. State Water Resources Control Board* (January 18, 2005) Case No. 04CS00535.

21 The TWC case is stronger than the *Morongo* case because in the TWC case there was actual  
22 prejudice to TWC. The Board on the record repeatedly turned for advice from Ms. Won. As the  
23 transcript of the hearing will indicate, the Board asked her what to do on matters that quite frankly  
24 should have been addressed to the legal advisor.  
25

26 In light of the actual prejudice to TWC, and the fact that this matter had recently been brought to  
27 the State Board's attention in the *Morongo* case in January 18, 2005, there is no excuse for this violation  
28 of TWC's due process rights.

(8) **Statement That Petition Has Been Sent to Regional Board.** A true and correct copy of this Petition for Review was sent to the Regional Board via electronic mail and First Class Mail on June 6, 2006 to the attention of Mr. Bruce H. Wolfe, Executive Officer.

(9) **Statement That Issues Were Raised Before The Regional Board, and Explanation Why Petitioner Was Unable to Raise Substantive Issues Before The Regional Board.**

The substantive issues and objections raised in this Petition were raised by TWC before the Regional Board through numerous written comments, submittal of voluminous documents and hearing testimony before the Regional Board.

In preparation for the May 10, 2006 Regional Board hearing, TWC submitted a written request to Regional Board staff for a one hour allotment of time to present relevant facts and arguments, due to the significant compliance issues confronting TWC. The Regional Board denied TWC's request, and limited TWC's presentation to 45 minutes. Some of petitioner's cross-examination was inappropriately counted as part of TWC's presentation time. Moreover, TWC was prevented from fully cross-examining the Staff. These limitations severely prejudiced TWC's ability to give a complete presentation of the complex factual, technical and legal circumstances presented by this matter.

The due process violation occurred at the hearing and particularly after the close of the hearing when no further comment from TWC was allowed. Although questions were directed to and advice was sought from the prosecuting attorney, accordingly, this is TWC's first chance to raise this issue.

### CONCLUSION

For all the foregoing reasons, TWC respectfully requests the State Board to stay and vacate the Order; and find that TWC is not liable for any administrative civil penalties.

Dated: June 6, 2006

Silicon Valley Law Group



JEFFREY S. LAWSON, ESQ.

Attachment A: Copy of ACL Order

1 Attachment B. Power-point hearing slides of: J. May  
2 Attachment C: Power-point hearing slides of: J. Werfal  
3 Attachment D: Power-point hearing slides of: J. Rosso  
4 Attachment E: OES Emergency Report Form  
5 Attachment F. ROWD Form  
6 Attachment G: UST Release Form  
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STATE OF CALIFORNIA  
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN FRANCISCO BAY REGION

ORDER NO. R2-2006-0030

ORDER SETTING ADMINISTRATIVE CIVIL LIABILITY FOR:

**TWC Storage, LLC**  
**1165 East Arques Avenue**  
**Sunnyvale, Santa Clara County**

The California Regional Water Quality Control Board, San Francisco Bay Region (hereinafter Water Board) finds, with respect to TWC Storage, LLC (hereinafter Discharger), that:

1. Discharger owns the property at 1165 East Arques Avenue in Sunnyvale. On July 15, 2005, Discharger was conducting building demolition activities at the site as part of a redevelopment project. During demolition activities on July 15, 2005, Discharger damaged an electrical transformer, initiating a spill of perchloroethylene (PCE). The damaged transformer was placed on the top of demolition debris and was left at the site until July 18, 2005, when pumping of its remaining contents commenced. During these four days, 250 gallons of PCE leaked out of the transformer, soaked into the soil, and infiltrated into the underlying shallow groundwater aquifer. Discharger did not notify the Office of Emergency Services about the spill until July 19, 2005.
2. Discharger has drilled 56 soil borings in the spill area and collected and analyzed over two hundred soil samples to define the extent of soil and groundwater contamination in both unsaturated and saturated zones. PCE concentrations in soil samples ranged from non-detect to 12,000 mg/kg. A groundwater sample collected from a nearby monitoring well (MM17A) on October 13, 2005 (three months after the discharge), contained 12,000 ug/l of PCE. A groundwater sample collected from the same well on October 12, 2000, contained 24 ug/l of PCE. PCE in this well has ranged between 7 and 69 ug/l in the past 15 sampling events conducted between January 4, 1992 and October 12, 2000. In addition, no significant changes in the concentration of PCE have been observed in four other nearby groundwater monitoring wells in the area during the October 13, 2005 sampling event. The California drinking water Maximum Contaminant Level (MCL) for PCE is 5 ug/l. To date Discharger has excavated and removed over 2,300 cubic yards of PCE-impacted soil from the site.
3. California Water Code (CWC) Section 13264 prohibits a person from discharging waste prior to filing a report of waste discharge (ROWD) and without waste discharge requirements (WDRs). Discharger discharged PCE without filing a ROWD or obtaining WDRs.

EXHIBIT   A


4. Under CWC Section 13265(c), any person discharging hazardous waste as defined by Health and Safety Code Section 25117, in violation of CWC Section 13264, is guilty of a misdemeanor and may be civilly liable in accordance with CWC Section 13265(d). PCE is a hazardous waste under Section 25117 of the Health and Safety Code and the regulations promulgated hereunder. Liability under CWC Section 13265(c) cannot be imposed if (a) a discharger is not negligent *and* immediately files a ROWD, or (b) the violation was insubstantial. Discharger did not file a ROWD subsequent to the discharge and therefore the first defense to liability is unavailable to Discharger. Additionally, discharging 250 gallons of a hazardous waste such as PCE without filing a ROWD is not an insubstantial violation.
5. Discharger violated CWC Section 13350(b)(1) because it discharged PCE, a hazardous substance as defined in CWC Section 13050, into waters of the State. Persons violating Section 13350(b)(1) are strictly liable.
6. For violating CWC Section 13264, the Water Board may administratively impose civil liability pursuant to CWC Sections 13265(c) and (d)(1) and 13323 in an amount that cannot exceed five thousand dollars (\$5,000) for each day in which the violation occurs. For violating CWC Section 13350(b)(1), the Water Board may administratively impose civil liability pursuant to CWC Sections 13350(e) and 13323 either on a daily basis or a per gallon basis, but not both. Under CWC Section 13350(e), the civil liability on a daily basis may not exceed five thousand dollars (\$5,000) for each day in which a violation occurs. The civil liability on a per gallon basis may not exceed \$10 for each gallon of waste discharged. Violations of CWC Section 13264 and Section 13350(b)(1) are separate offenses for which civil liability may be imposed under both sections.
7. On January 27, 2006, the Executive Officer issued Administrative Civil Liability Complaint No. R2-2006-0002 (Complaint) to Discharger proposing a \$40,000 Administrative Civil Liability for the violations of the CWC Sections 13264 and 13350(b)(1). The \$40,000 is based on four days of violating CWC Section 13264 (at a civil liability rate of \$5,000 per day of violation) and four days of violating CWC Section 13350(b)(1) (at a civil liability rate of \$5,000 per day of violation).
8. The Water Board, after considering the evidence and hearing all testimony, determined Discharger is subject to civil penalties for violating Water Code Sections 13264 and 13350(b) as alleged in the Complaint. In determining the amount of civil liability, the Water Board considered the factors set forth in CWC Section 13327.
9. A \$25,000 Administrative Civil Liability is appropriate based on the determinations in Finding No. 8. The prosecutorial staff report dated April 28, 2006, supporting the civil liability is incorporated herein by this reference.
10. This action is an Order to enforce the laws and regulations administered by the Water Board. Issuance of this Order is exempt from the provisions of the California

Environmental Quality Act (Public Resources Code Section 21000, et seq.), in accordance with Section 15321(a)(2), Title 14, of the California Code of Regulations.

11. Discharger may petition the State Board to review this action. The State Board must receive the petition within 30 days of the date this Order was adopted by the Water Board. The petition will be limited to raising only the substantive issues or objections that were raised before the Water Board at the public hearing or in a timely submitted written correspondence delivered to the Water Board.

IT IS HEREBY ORDERED that TWC Storage, LLC, is civilly liable for the violation of California Water Code Sections 13264 and 13350(b)(1), and shall pay the administrative civil liability in the amount of \$25,000. The \$25,000 consists of \$5,000 for violating CWC Section 13264 and \$20,000 for violating CWC Section 13350(b)(1). The liability shall be paid to the State Water Pollution Cleanup and Abatement Account within 30 days of the date of this Order.

I, Bruce H. Wolfe, Executive Officer, do hereby certify that the foregoing is a full, complete, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Francisco Bay Region, on May 10, 2006.

  
\_\_\_\_\_  
Bruce H. Wolfe  
Executive Officer

# Demolition Accident

Jack May

6/5/2006

TWC Storage LLC

1

## Introduction

- ❑ TWC Should Not Be Penalized For A Transformer Accident It Did Not Cause And Could Not Reasonably Anticipate
- ❑ Jack May
  - Vice President, TWC Storage LLC
  - BA Psychology, Stanford University
  - MBA, Stanford University

6/5/2006

TWC Storage LLC

2



# Topics

- ❑ About TWC
- ❑ The Property Acquisition
- ❑ TWC met the standard of care for a estate development company
- ❑ TWC did all that a company not in the hazardous materials business can be expected to do
- ❑ TWC should be given credit for responding to the accident quickly and completely

6/5/2006

TWC Storage LLC

3

# About TWC

- ❑ Real Estate Development Company
  - Two person office in Redwood City
- ❑ What TWC is:
  - Not construction company
  - Not a construction management company
  - Not involved with hazardous materials
  - We hire independent contractors for ALL aspects of developments/acquisitions.
- ❑ TWC's proper involvement in this project

6/5/2006

TWC Storage LLC

4

# The Property Acquisition

- ❑ Former AMD/MMI Manufacturing Facility
  - Mini Storage a good project for the area
  - AMD remains liable for soil and groundwater-TWC not involved in hazardous materials
- ❑ Lengthy Due Diligence Investigation
  - TWC inspections/AMD representatives
  - Hired top consultants for property inspection
  - AMD approved demolition contractor (QCI)
  - Project meetings with AMD, TWC and QCI to understand site conditions and what to expect during the demo process

6/5/2006

TWC Storage LLC

5

# The Property Acquisition

- ❑ Results of Property Inspection
  - No hazardous materials, except
    - Asbestos
    - Luminescent exit signs
  - PG&E Transformers
    - Contacted PG&E and arranged their removal
  - Results of Demolition Project Meetings
    - All hazardous materials removed except asbestos and Luminescent exit signs

6/5/2006

TWC Storage LLC

6

## The Undisclosed Transformer Accident

- ❑ Campanella Construction Co. while removing the Energy Center picked up the transformer
  - Told all Hazardous Materials removed
  - Already removed several pieces of electrical equipment
- ❑ QCI called and went to the site
- ❑ TWC in Santa Rosa
  - Not an onsite supervisor

6/5/2006

TWC Storage LLC

7

## The Undisclosed Transformer Accident

- ❑ AMD called by QCI & TWC
  - Told it was water
  - AMD came out with consultants
    - Ordered cover with plastic and that was done
- ❑ TWC did not have an environmental consultant at this stage of the project because no Haz Mat expected
  - Standard business practice
- ❑ TWC & QCI did what we thought best on the site
  - Not a real estate developers area of expertise
  - Contractors moved transformer to contain draining and away from daycare center

6/5/2006

TWC Storage LLC

8

## The Undisclosed Transformer Accident

- ❑ Daycare notified twice that day
- ❑ Hired Clean Harbors ASAP
- ❑ Not told that must report
  - AMD said hire a consultant and they'll figure out if you need to report
  - Clean Harbors did not tell us
- ❑ No idea this spill would effect groundwater at all
- ❑ AMD refused to accept any responsibility
- ❑ Sent notification to EPA as soon as learned of the requirement

6/5/2006

TWC Storage LLC

9

## TWC Did All That It Could

- ❑ TWC was not negligent
  - Hired top consultants to investigate property
  - Inspected ourselves
  - Interviewed & toured property w/ AMD
  - No way to know
- ❑ Did everything to respond to the problem
  - Called in experts: AMD/Clean Harbors/Clayton
  - Disclosed to daycare
  - Told consultants to do whatever it took

6/5/2006

TWC Storage LLC

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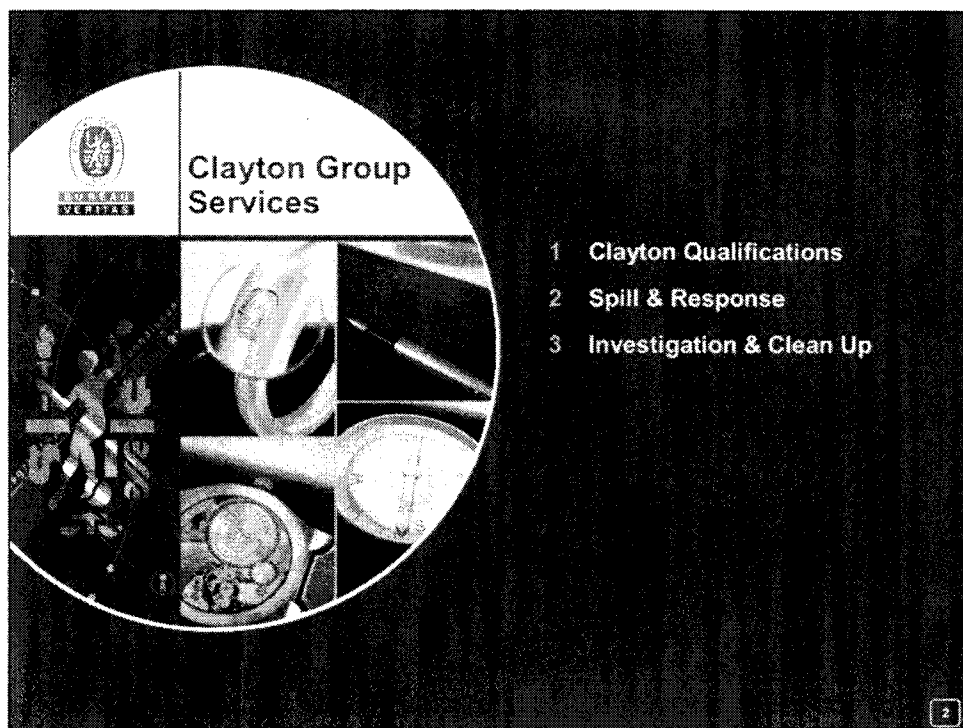
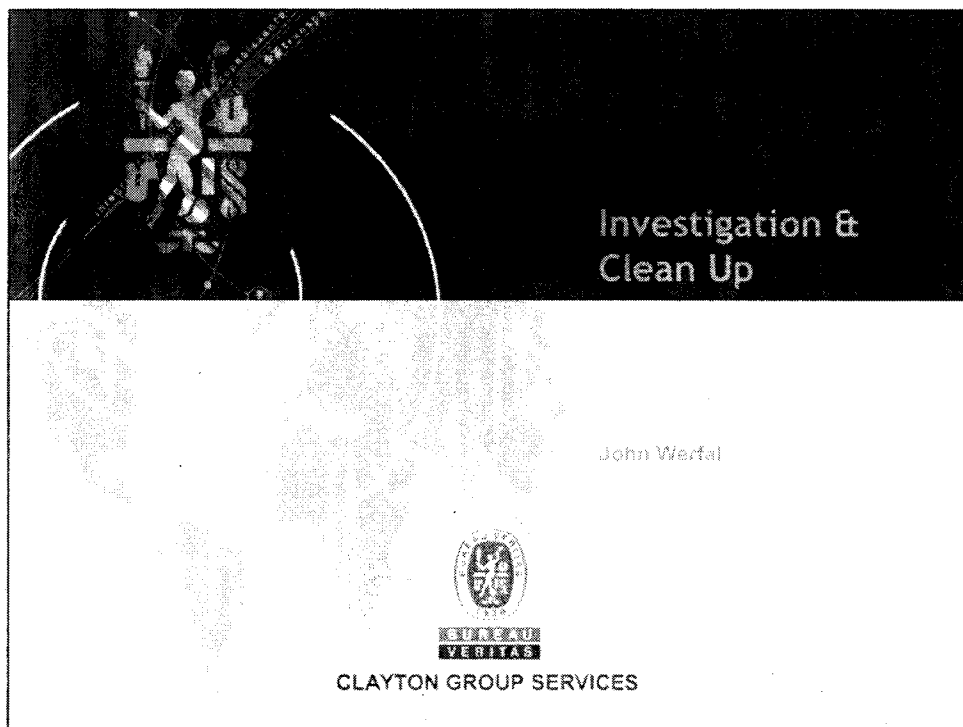
## TWC Should Not Be Penalized

- ❑ Spent over \$1.5M so far and estimates exceed \$2.5 M
  - Penalty impacts already negative cash flow on a much delayed project
  - Penalty does not consider the circumstances where no reason to suspect Haz Mat
  - Nothing TWC could have done differently to avoid the accident
  - Never had a violation and not in Haz Mat business
- ❑ Would not contest the ACL if we thought it was fair. Do not see why TWC of all the actors involved should be singled out for punishment

6/5/2006

TWC Storage LLC

11



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EXPERIENCE

## Qualifications

- ▶ Bureau Veritas' operations cover 140 countries and include more than 600 offices and laboratories. With more than 20,000 employees, Bureau Veritas serves more than 200,000 customers in many different industries across the world, from local companies to the largest multinational corporations. Globally, Bureau Veritas offers an extensive range of technical services in the U.S. including:
  - Geotechnical Engineering
  - Environmental
  - Construction Material Testing
  - Building, Structure, and Steel Inspections
  - Code Compliance
  - Water Resource Management
- ▶ John Werfal-Project Manager
  - B.S., M.B.A.
  - 21 years experience
  - Team 3-8 professionals using nationwide resources



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July 15, 2005

## Spill &amp; Response



- ▶ Transformer damaged at approximately 9:00 AM on July 15, 2005
- ▶ Contractor notifies AMD and TWC
  - Liquid first thought to be water
- ▶ Immediate actions taken to minimize spill impacts
  - Containment
  - Sampling
  - Control of Emissions
  - Emergency Response Contractor
- ▶ Duration of release
  - Leakage from base of transformer
  - Physical properties of PCE



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First Week

## Spill &amp; Response

- At 7:00 AM on Saturday, July 16, 2005, Clean Harbors surveyed site and began to secure necessary equipment.
- Clean up of material used to absorb spilled liquid was completed on Sunday, July 17 and Monday, July 18, 2005.
- PCE was drained from a second unbroken transformer on July 18 and July 19, 2005.
- Wednesday, July 20 through Friday, July 22, 2005, Clean Harbors removed waste materials from sumps and prepared transformers for transport and disposal.
- Following removal of overlying construction debris and pavement, soil samples collected by AMD on Friday, July 22, 2005.



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First Week

## Spill &amp; Response

- Clayton was rehired on Friday, July 22, 2005 and on site Saturday, July 23, 2005
  - Surveyed the site to identify areas affected by PCE release
    - » Soil and construction debris in bins
    - » Transformers had been properly drained
    - » Affected areas covered in plastic
- Clean Harbors had removed approximately 85% of the spilled mass by the time Clayton began work



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Second Week

## Investigation &amp; Clean Up

- Communication with Board staff, City of Sunnyvale, and involved parties
- Tuesday, July 26 – RWQCB staff request work plan by July 29, 2005
- Wednesday, July 27
  - Board instructed Clayton to coordinate with AMD & City.
    - » Submitted work plan in draft to AMD's consultant
  - Emailed work plan to Board and approved that day
- Thursday, July 28 and Friday, July 29
  - Site Investigation
  - Excavation Preparation for Weekend Shift
    - » Permits, notifications
    - » Mobilize specialty contractors (5)
    - » Hired CIH for air monitoring, obtained roll off bins, mobile lab etc.
- Did in 2 days what normally takes over 2 weeks on a fast job.



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July-October

## Investigation &amp; Clean Up



- Excavation and sampling on Saturday, July 30, 2005
- Additional excavation during night shift on August 3, 2005
- Sequencing between investigation and excavation activities as quickly as laboratory analyses could be completed
- Submittal of interim data packages and work plans to Board staff to expedite clean up activities.



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July-October

## Investigation &amp; Clean Up

ID	Task Name	Start	Finish	2005											
				Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
1	Release from Transformer	7/15/2005	7/15/2005												
2	Site Stabilization/Initial Cleanup Efforts	7/15/2005	7/25/2005												
3	Agency Notification	7/19/2005	7/19/2005												
4	Soil Sampling and Analysis (ASD)	7/19/2005	7/27/2005												
5	RWQCB Work Plan Request	7/26/2005	7/26/2005												
6	Submit Work Plan	7/27/2005	7/27/2005												
7	Site Investigation	7/28/2005	7/29/2005												
8	Secure Permits and Approvals	7/28/2005	7/29/2005												
9	Excavation, Sampling and Analysis	7/28/2005	8/9/2005												
10	Prepare and Submit Plan for Additional Investigation	8/9/2005	8/10/2005												
11	Site Investigation and Sample Analysis	8/9/2005	8/19/2005												
12	Submit Work Plan for Additional Excavation	8/23/2005	8/23/2005												
13	Excavation, Sampling and Analysis	8/26/2005	9/14/2005												
14	Site Investigation and Sample Analysis	9/20/2005	9/23/2005												
15	Excavation, Sampling and Analysis	9/26/2005	10/11/2005												



U.S. ENVIRONMENTAL PROTECTION AGENCY

9

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Scope of Work

## Investigation &amp; Clean Up

## Completed Work

- 100's of borings and samples
- Two large excavations (3,100 tons)
- Ongoing indoor air monitoring
- Remediation in the area of nitrogen line
  - » A special problem-could shut down manufacturing
  - » Injection of chemical oxidant & soil vapor extraction.
- All coordinated with RWQCB staff and other parties

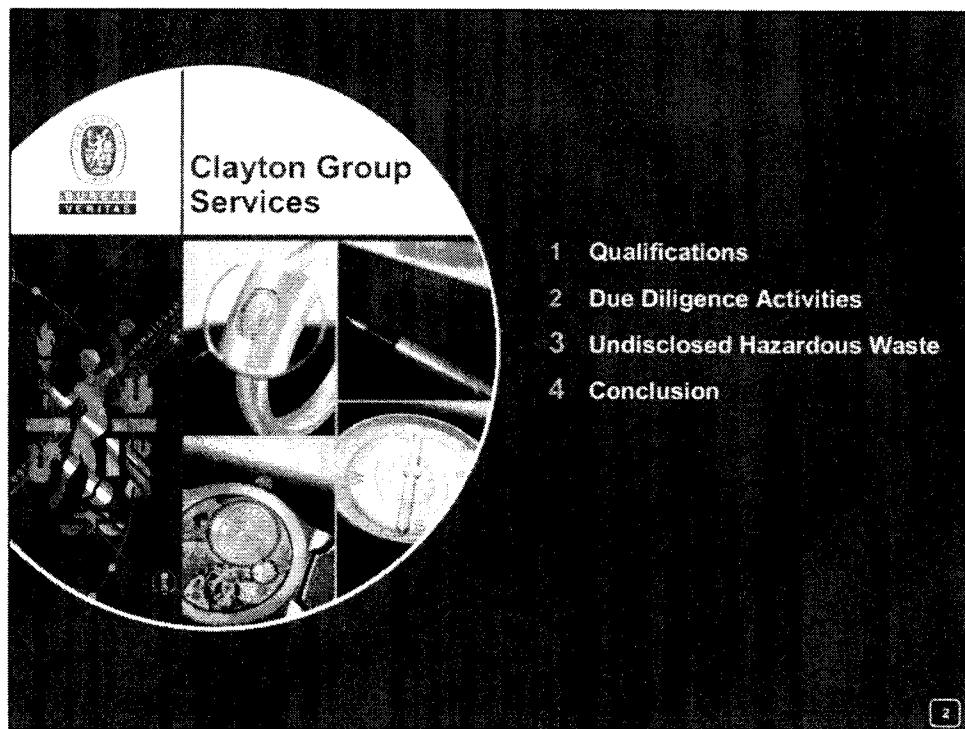
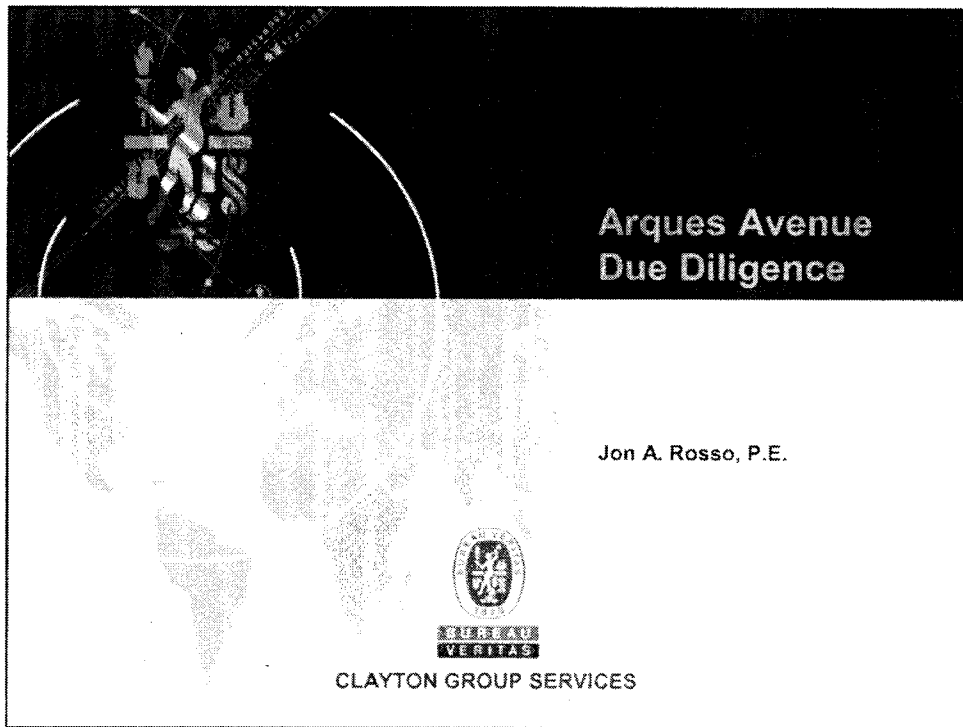


U.S. ENVIRONMENTAL PROTECTION AGENCY

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- TWC expended significant resources to move as fast as possible to clean this up
- TWC has not disputed any Board directive and has led the investigation and clean up
- TWC has not slowed down the project to dispute allocation or responsibility
- Initial response actions immediately following the accident were prompt and appropriate
- There was no time lag in implementing site investigation and interim remedial actions





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## Qualifications

## Due Diligence Expertise

- Providing environmental consultation for 52 years
- Over 500 professionals in a variety of disciplines
- Nearly 3,000 Phase I Environmental Site Assessments per year
- Approved by over 70 banks and lenders to conduct Phase I ESAs
- Clayton staff assigned to this project
  - Jon A. Rosso, P.E.
    - B.S. & M.S. Civil Engineering, UC Berkeley
    - 22 years of experience in environmental consulting
  - Jesse D. Edmands
    - B.A. Environmental Science, Boston University
    - Over 100 Phase I Assessments completed

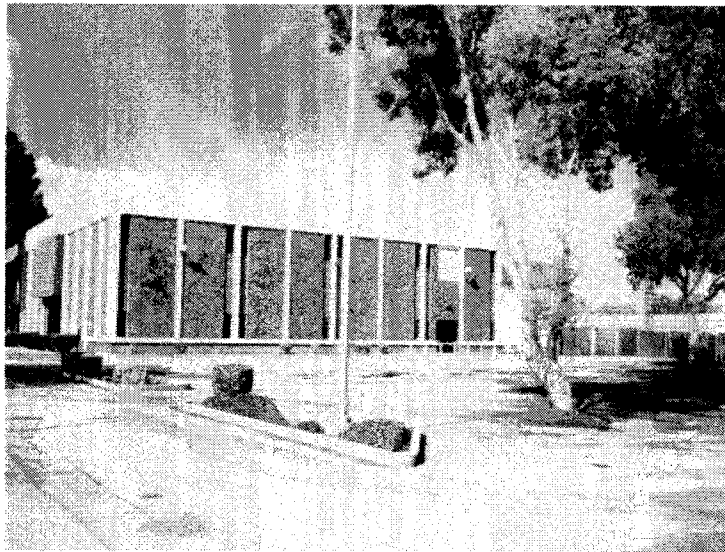


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## Due Diligence

## 1165/1175 Arques Avenue

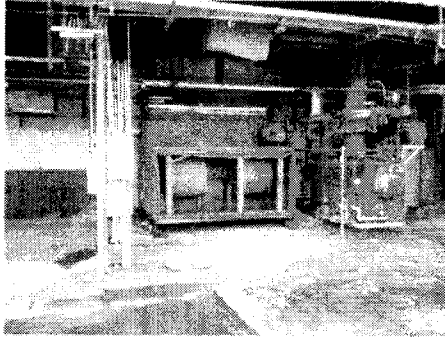


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## Due Diligence

## File Review



- Review of AMD files
  - 8 to 10 file cabinets of environmental documents
  - Facility closure reports
- Review of Regulatory Agency Files
  - RWQCB Files
  - DTSC Files
  - USEPA Files
  - County Health Dept. Files
  - Sunnyvale Files (Building & Fire)
- Regulatory Agency Interviews
  - Keith Roberson, RWQCB
  - Rick Miller, Fire Dept Inspector



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## Due Diligence

## Owner Interview



- According to AMD (owner):
  - Described past industrial activity
  - MMI/AMD chip manufacturing between 1970 to 1989
  - Site abandoned in 1989
  - Formal facility closure 1990
  - All hazardous materials removed except asbestos and luminescent signs
  - No active transformers disclosed
  - Significant soil/groundwater contamination (Superfund)
  - AMD assuming financial responsibility for cleanup after property sale

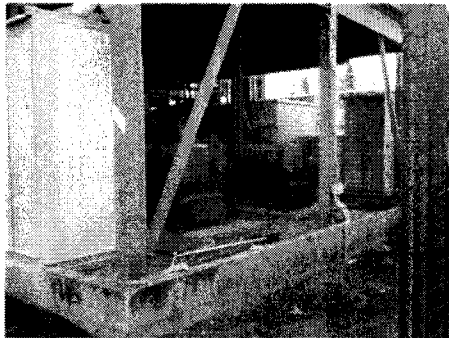


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## Due Diligence

## Visual Inspection of Facility



## Based on Visual Inspection:

- Completely vacant
- Property abandoned for 16 years
- Poor building condition
- Roof leaks
- Damaged building materials
- No lighting available
- Weeds and moss growing
- Rusty metal
- No chemical storage observed
- Active PG&E transformer inspected for PCBs
- Significant remnant rusty equipment that appeared consistent with the 1990 facility closure



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## Due Diligence

## Review of Reports and Documents

- 1990 Post Closure Report by C.H.A.S.E.
  - The report concluded: no hazardous materials are stored or used on-site except for a few specific listed items that were temporarily being stored on-site.
- Hazardous Material Management Plans (HMMPs)
  - HMMPs required for life safety such as protection of fire fighters and neighbors
  - No chemicals declared by AMD in 2004
  - The purpose of facility closure under HMMP rules is to remove all hazardous materials and fully document decontamination procedures (make the facility safe)
- Other facility closure documents:
  - After closure, the Energy Center was listed as containing only 150 gallons of cooling tower treatment chemicals.
  - The chemicals temporarily stored on-site (per C.H.A.S.E.) were removed, as documented in subsequent closure activities.



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## 2

## Due Diligence

## Summary

- Review of reports by properly qualified companies, which have been approved by government agencies, is a practical, standard way to evaluate previous activities and events at a property.
- It is practically impossible to recheck and retest all work done by others.
- Relying on the C.H.A.S.E Post Closure report and interviews/file reviews of government agencies meets the standard of care for environmental due diligence.

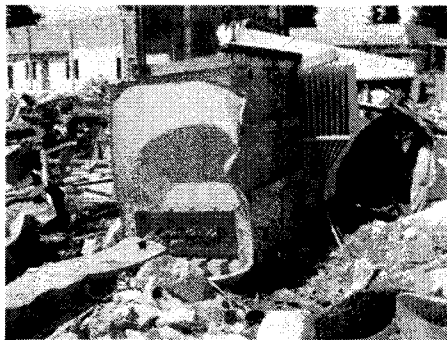


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## 3

Undisclosed  
Hazardous Waste

## Transformer



- Tetrachloroethylene transformer was installed in 1984 and abandoned 1990

- Should have been disclosed to regulatory agencies every year between 1984 and 2005.
- H&SC sec 25190, 25189, Sunnyvale Fire Code sec 16.52.503, 42 USC sec 6928
- Became hazardous waste when abandoned in 1990 and required disposal within 90 days



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Undisclosed  
Hazardous Waste

## Transformer

- 15 to 20 pieces of remnant equipment in former Energy Center appeared consistent with equipment closed in 1990
- Transformer looked like one more big rusty piece of closed and inerted equipment
- Tetrachloroethylene is virtually unheard of in transformers, extremely rare
- Not marked as active or with appropriate chemical safety placards
  - Only a yellow painted stencil that read "Perclene Filled"
- "Perclene" is one of numerous manufacturer's trade names for tetrachloroethylene and was not readily recognized
  - Even AMD and its environmental consultant had to look it up
- After release, contacted retired MMI environmental manager knew of the two transformers in the Energy Center and said they were purchased by MMI in 1984 with tetrachloroethylene fluid



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## Conclusion

- The due diligence activities met the standard of care under ASTM guidance and industry standards
- TWC did all that was reasonable to investigate the condition of the property
- It was the obligation of the MMI/AMD to disclose to government agencies the presence of the tetrachloroethylene filled transformer
- It was the obligation of AMD to properly dispose of the used tetrachloroethylene within 90 days of the equipment abandonment
- Tetrachloroethylene is virtually unknown in transformers
- If MMI/AMD had properly listed the tetrachloroethylene filled transformers in required HMMP plans, they most likely would have been noted by C.H.A.S.E. and Sunnyvale Fire Department Inspectors
- "Perclene" is a manufacturer's trade name and would not be recognized as environmentally significant without research



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# EMERGENCY RELEASE FOLLOW - UP NOTICE REPORTING FORM

A	BUSINESS NAME <b>TWC Storage</b>	FACILITY EMERGENCY CONTACT & PHONE NUMBER <b>Jack May (650) 464-6700</b>
B	INCIDENT MO DAY YR DATE <b>07/15/05</b>	TIME OES NOTIFIED <b>0800</b> (use 24 hr time) OES CONTROL NO.
C	INCIDENT ADDRESS LOCATION <b>1165 East Arques</b>	CITY/COMMUNITY COUNTY ZIP <b>Sunnyvale Santa Clara</b>
D	CHEMICAL OR TRADE NAME (print or type) <b>Perchloroethylene</b>	CAS Number <b>127184</b>
E	CHECK IF CHEMICAL IS LISTED IN 40 CFR 355, APPENDIX A <input type="checkbox"/>	CHECK IF RELEASE REQUIRES NOTIFICATION UNDER 42 U.S.C. Section 9603 (a) <input type="checkbox"/>
F	PHYSICAL STATE CONTAINED <input type="checkbox"/> SOLID <input checked="" type="checkbox"/> LIQUID <input type="checkbox"/> GAS	PHYSICAL STATE RELEASED <input type="checkbox"/> SOLID <input checked="" type="checkbox"/> LIQUID <input type="checkbox"/> GAS
G	ENVIRONMENTAL CONTAMINATION <input type="checkbox"/> AIR <input type="checkbox"/> WATER <input type="checkbox"/> GROUND <input checked="" type="checkbox"/> OTHER	QUANTITY RELEASED Estimate <b>100-150 Gallons</b>
H	TIME OF RELEASE <b>1100 hours</b>	DURATION OF RELEASE <b>0 DAYS 0 HOURS 10 MINUTES</b>
I	ACTIONS TAKEN <b>An electrical transformer containing perchloroethylene was punctured during demolition, and the perchloroethylene was immediately placed in an area with absorbing soils and construction debris. This area was fully contained on a concrete slab and asphalt area, and no perchloroethylene did at any time leak into storm drains, water supply, etc. Containment was maintained, and a hazmat contractor was brought on-site within hours to remove the soil and construction debris.</b>	
J	KNOWN OR ANTICIPATED HEALTH EFFECTS (Use the comments section for addition information) <input type="checkbox"/> ACUTE OR IMMEDIATE (explain) <b>None</b> <input type="checkbox"/> CHRONIC OR DELAYED (explain) <b>None</b> <input type="checkbox"/> NOTKNOWN (explain) <b>None</b>	
K	ADVICE REGARDING MEDICAL ATTENTION NECESSARY FOR EXPOSED INDIVIDUALS <b>One equipment operator reported smelling the liquid, and the area was evacuated. No medical problems were reported.</b>	
L	COMMENTS (INDICATE SECTION (A - G) AND ITEM WITH COMMENTS OR ADDITIONAL INFORMATION)	
M	CERTIFICATION: I certify under penalty of law that I have personally examined and I am familiar with the information submitted and believe the submitted information is true, accurate, and complete. REPORTING FACILITY REPRESENTATIVE (print or type) <b>Jack May</b> SIGNATURE OF REPORTING FACILITY REPRESENTATIVE <u><i>Jack May</i></u> DATE: <u>7/18/05</u>	

CELL PHONE 650464-6700

EXHIBIT **E**

LOCATION:

RX TIME 08/02 '05 13:55

29/56

STATE OF CALIFORNIA – CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD  
1515 CLAY STREET, SUITE 1400  
OAKLAND, CALIFORNIA 94612

**APPLICATION FOR 401 WATER QUALITY CERTIFICATION  
AND/OR REPORT OF WASTE DISCHARGE**

(FORM R2C502)

*Note: This form is designed to be completed manually. For an electronic version, please request FORM R2C502-E*

1. APPLICANT'S NAME	4. AUTHORIZED AGENT'S NAME AND TITLE (an agent is not required)
2. APPLICANT'S ADDRESS	5. AGENT'S ADDRESS
3. APPLICANT'S PHONE & FAX NOS. (email optional)	6. AGENT'S PHONE & FAX NOS. (email optional)

**7. STATEMENT OF AUTHORIZATION**

I hereby authorize \_\_\_\_\_ to act on my behalf as my agent in the processing of this application  
and to furnish, upon request, supplemental information in support of this permit application.

\_\_\_\_\_  
APPLICANT'S SIGNATURE

(This must be signed by the Applicant, not the authorized agent)

\_\_\_\_\_  
DATE

**PROJECT OR ACTIVITY INFORMATION**

8. PROJECT NAME OR TITLE (See Instructions.)		
9. NAME OF AFFECTED WATERBODY(IES) (See instructions.)	10. PROJECT STREET ADDRESS (if applicable)	
11. LOCATION OF PROJECT		
COUNTY	CITY/TOWN (or unincorporated)	<u>Region 2 – San Francisco Bay</u> REGIONAL WATER BOARD REGION

12. OTHER LOCATION DESCRIPTIONS (watershed, latitude & longitude, river mile, etc. Attach map. See instructions.)
---

13. DIRECTIONS TO THE SITE
----------------------------

14. DESCRIPTION OF ACTIVITY AND ENVIRONMENTAL IMPACTS (Provide a full, technically accurate description of the entire activity and associated environmental impacts. Continued on next page. Attach additional pages as needed. See instructions.)
--

EXHIBIT F

14 DESCRIPTION OF ACTIVITY AND ENVIRONMENTAL IMPACTS (CONTINUED)

15. AVOIDANCE OF IMPACTS (Describe efforts to avoid and minimize impacts to waters of the State. Attach additional pages as needed. See instructions.)

16. PROJECT PURPOSE (Describe the reason or purpose for the overall project. Attach additional pages as needed. See instructions.)

17. ENVIRONMENTAL DOCUMENTS (list any non-CEQA environmental documents that have been prepared for the project and/or the project site. Provide the date of the document and the name of the individual, firm, or agency that prepared it. Attach additional pages as needed. Provide a copy of delineations and endangered species surveys. See instructions.)

DREDGE & FILL INFORMATION

18. The following items must be completed for each action where fill or other material will be temporarily (T) or permanently (P) discharged to a wetland or other waterbody, and where material will be dredged from a waterway (add additional pages as necessary) Provide a map showing the location of each action (See instructions):

Location Number	LOCATION (show on plan & indicate waterbody)	REASON FOR ACTION (See instructions)	AMOUNT AND TYPE OF MATERIAL (in cubic yards, see instructions)	SURFACE AREA OF FILL (in acres and/or linear feet; specify (T) or (P); see instructions)

## MITIGATION

19. **MITIGATION** (Describe the size, type, and functions, and values of the proposed mitigation. Describe success criteria, monitoring, and long-term funding, management, and protection of the mitigation site. Attach a Mitigation Plan if needed. Attach additional pages as needed. See instructions and contact Regional Board staff for additional assistance.)

## CEQA

20. **CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) Documents:** Indicate the status (in preparation, complete, under revision, not applicable) of CEQA documents prepared for the project (see instructions).

TYPE OF DOCUMENT	STATUS	DATE COMPLETED (or expected to be complete)	TYPE OF DOCUMENT	STATUS	DATE COMPLETED (or expected to be complete)
Initial Study			Notice of Preparation		
Draft Environmental Impact Report			Final Environmental Impact Report		
Negative Declaration			Mitigated Negative Declaration		
Notice of Categorical Exemption Exemption Number: _____			Notice of Statutory Exemption Exemption Number: _____		
Other (describe)					
Notice of Determination*			*Note: A Notice of Determination or Notice of Exemption from the Lead Agency is required before a certification or waiver can be issued.		

Lead Agency: \_\_\_\_\_

Contact: \_\_\_\_\_

Telephone: \_\_\_\_\_

State Clearing House Number: \_\_\_\_\_

## ADDITIONAL INFORMATION

21. **HAS ANY PORTION OF THE WORK BEEN INITIATED?** YES ☐ NO ☐  
 IF YES, DESCRIBE THE INITIATED WORK, and explain why it was initiated prior to obtaining a permit. Indicate whether any enforcement action has been taken against the project.

22. **HAS A FEDERAL AGENCY OR THE APPLICANT PROVIDED PUBLIC NOTICE OF THIS APPLICATION FOR WATER QUALITY CERTIFICATION?**

Federal Agency: YES ☐ NO ☐ Date: \_\_\_\_\_ Type of Notification: \_\_\_\_\_ Agency Name and Contact: \_\_\_\_\_

Applicant: YES ☐ NO ☐ Date: \_\_\_\_\_ Type of Notification: \_\_\_\_\_ Media Name and Contact: \_\_\_\_\_

IF PUBLIC NOTICE HAS NOT BEEN MADE, provide the name, address, and phone number (if available) of adjacent property owners, lessees, etc., and any other parties known to be interested in the project:

23. <b>OTHER PERMITS</b> (List other local, state or federal licenses, permits, and agreements ("permits") that will be required for any construction, operation, maintenance, or other actions associated with the project. Include permits from CDFG, BCDC, USACE, USFWS, RWQCB, SWRCB, local planning agencies, local building permits, etc. Indicate date of application and status (no action, approved, or denied) of each. Attach copies of all draft or final documents. See instructions.)						
AGENCY	CONTACT (with phone number)	TYPE OF APPROVAL	PERMIT OR ID NUMBER	DATE APPLIED	STATUS	DATE OF ACTION

24. <b>OTHER PROJECTS</b> (List and describe other projects implemented or planned that are related to the proposed project, or that may impact the same waterbody. See instructions. Add additional sheets if necessary.)			
PROJECT NAME	DESCRIPTION	WATERBODY AND WATERSHED	DATE IMPLEMENTED/PLANNED

25. Application is hereby made for a permit or permits to authorize the work described in this application. I certify, under penalty of perjury, that this application is complete and accurate to the best of my knowledge. I further certify that I possess the authority to undertake the work described herein or am acting as the duly authorized agent of the applicant.

-----

SIGNATURE OF APPLICANT	DATE	SIGNATURE OF AGENT	DATE
------------------------	------	--------------------	------

The application must be signed by the person who desires to undertake the proposed activity (Applicant) or a duly authorized agent if the statement in Block 7 has been filled out and signed.

Attach fee deposit (see Instructions page 7) and any additional documents and submit this application to:

**SFBRWQCB**  
**Attention: 401 Water Quality Certification**  
**1515 Clay Street, Suite 1400**  
**Oakland, CA 94612**

Note: This form, FORM R2C502, was designed to be completed manually (i.e., printed and typed, or completed using Microsoft Word with few electronic embellishments). An electronic version, designed for use as a Microsoft Word document or template may be obtained by calling 510-622-2300 and requesting 401 Application FORM R2C502-E – Electronic version. It will be emailed to your email address.



# California Regional Water Quality Control Board

## San Francisco Bay Region



Gray Davis  
Governor

Winston H. Hickox  
Secretary for  
Environmental  
Protection

Internet Address: <http://www.swrcb.ca.gov>  
1515 Clay Street, Suite 1400, Oakland, California 94612  
Phone (510) 622-2300 • FAX (510) 622-2460

### APPLICATION FOR 401 WATER QUALITY CERTIFICATION AND/OR REPORT OF WASTE DISCHARGE

#### INSTRUCTIONS

Revised May 2002

This document describes information to be submitted to the San Francisco Bay Regional Water Quality Control Board (Regional Board) when applying for a Clean Water Act §401 Water Quality Certification and/or filing a Report of Waste Discharge for projects that include dredging, filling, or otherwise impacting waters of the United States and/or waters of the State. The application for Water Quality Certification and the Report of Waste Discharge will be referred to collectively in this document as "application."

*Please Note: A Report of Waste Discharge for discharge of waste to land, as in a landfill, must be submitted on Form WD200. Please contact the Regional Board at (510) 622-2300 for this application.*

#### APPLICATION SUBMITTAL

Applications and fees should be submitted to the above address, Attention: 401 Water Quality Certification. A minimum \$500 fee deposit is required as part of a complete application. The total fee amount will be assessed according to 23 CCR Sections 2200 (e) and 3833 (b)(2)(A) (see Water Quality Certification Fee Schedule, on page 7), and full payment is required before a certification or waiver can be issued. *Make checks payable to San Francisco Bay Regional Water Quality Control Board (or SFBRWQCB).*

We encourage the Applicant to submit the required information using the Regional Board's Application for 401 Water Quality Certification and/or Report of Waste Discharge (FORM R2C502 or R2C502-E). This application form is available at [www.swrcb.ca.gov/rwqcb2/](http://www.swrcb.ca.gov/rwqcb2/) or by calling 510-622-2300. The U.S. Army Corps of Engineers' (Corps) 404 permit application form may be used in place of the Regional Board form, but it must be augmented to include all of the information described in these instructions. For projects occurring within multiple State and Federal agency jurisdictions, the Joint Aquatic Resources Permit Application (JARPA) may be used. The JARPA form, which will be accepted by all agencies concurrently, is available at [www.abag.ca.gov/bayarea/sfep/projects/JARPA/JARPA.html](http://www.abag.ca.gov/bayarea/sfep/projects/JARPA/JARPA.html), or by calling 510-622-2419. Applications submitted on the JARPA form must also be augmented to include all of the information described in these instructions. A letter or other application format will be accepted, provided it contains all required information described herein.

Please note that incomplete applications and/or lack of a deposit fee will delay the processing of your application. The review period of 60 days as required by 33 CFR 325.2 (b)(ii) and notification of other resource agencies will commence when the Regional Board **receives a complete application package**. The 60-day review period can be extended up to one year under special circumstances.

#### APPLICATION REQUIREMENTS

An application for 401 Water Quality Certification or a Report of Waste Discharge must provide sufficient information for the Regional Board to determine whether the project complies with State water quality standards and will not result in adverse impacts to waters of the State. Water quality standards and the Regional Board's policies for protecting waters of the State are defined in the San Francisco Bay Basin Water Quality Control Plan (Basin Plan). The Basin Plan may be purchased for \$38 at the above address, and it may be viewed at [www.swrcb.ca.gov/rwqcb2/](http://www.swrcb.ca.gov/rwqcb2/). Additional state regulations governing Regional Board actions are found in the Porter-Cologne Water Quality Control Act (Sections 13000-14958 of the California Water Code) and Titles 14, 23, and 27 of the California Code of Regulations (CCR). Contents of a complete application for water quality certification are described in CCR Title 23 Section 3856. Federal regulations applicable to 401 Water Quality Certification actions are found in the Code of Federal Regulations (CFR), Title 33 Part 330, and Title 40 Parts 121, 131, and 230.

The following instructions are intended to help the Applicant prepare a complete application in compliance with CCR Title 23 Section 3856. Following these guidelines will help reduce delays in processing your application. Once an application is determined to be complete, additional information may be requested for clarification.

*Answer each question completely. If there is insufficient room on the form for a complete response, please provide an attachment and identify the answer via the corresponding block number.*

## 1. APPLICANT INFORMATION

**Blocks 1 through 3:** Provide the name, full mailing address, and daytime phone number(s) of the legal Applicant or "responsible party." The Applicant will be the entity or individual to whom the permit will be issued. *If the Applicant is an agency, company, corporation or other organization, indicate the responsible officer and title.*

**Blocks 4 through 7:** Provide the name, address, and phone number(s) of any agent authorized to act on behalf of the Applicant. If an agent is identified, the Applicant must sign the statement authorizing the agent to act on behalf of the Applicant.

## 2. PROJECT OR ACTIVITY INFORMATION

### Blocks 8 through 11:

- Provide a project name or title consistent with other agency applications.
- Provide the name (if available) and type of any affected waterbody(ies). Indicate on a site location map the exact location of any waterbody(ies) or special aquatic site(s) that may be permanently or temporally affected either directly or indirectly by the project. The term "waterbody," as used in this document, refers to any wetland, stream, creek, intermittent drainage, drainage ditch, drainage swale, seep, pond, bay, estuary, vernal pool, marsh, ground water basin, or other waters of the State. If the project affects an unnamed tributary, clearly show the location of the tributary on a map and indicate the name of the nearest named waterbody to which it contributes. Provide the address (if applicable) of the project site.
- Provide the city, county, and water quality control board region wherein the project site lies. If the project site is in an unincorporated area, so indicate. Note that, if the project site is in two or more regions, the application must be submitted to the State Water Resources Control Board, not the regional boards, for action.

### Blocks 12 and 13:

- Provide a map that clearly indicates the project site location and the boundary of the watershed within which the project lies, including an estimation of the drainage area (in acres) upstream of the project (USGS 7 ½ minute quadrangle is recommended). Provide the latitude and longitude of the project site (this can be approximated from an appropriate map).
- Include directions to the site from a known location or landmark, including highway, street names and numbers.

**Block 14:** Summarize the purpose and need for the over-all proposed project.

**Block 15:** Provide a full, technically accurate description of the entire activity and associated environmental impacts, including areas outside of jurisdictional waters. The description should include, but should not be limited to, the following points, as applicable:

- Purpose, dimensions, and locations of existing and proposed structures or fill within waters of the State, such as culverts, gabions, riprap, wing walls, dikes, cofferdams, and excavations;
- Impacts and potential impacts to beneficial uses as described in the Regional Board's Basin Plan, for any affected waterbody(ies). *Note: if the waterbody is not named in the Basin Plan, the beneficial uses of the nearest downstream named waterbody apply. For*



wetlands, beneficial uses are determined according to the methodology described on page 4-50 of the Basin Plan;

- Acreage size of entire project;
- Pre- and post-construction stormwater management and pollution control measures. If a Stormwater Pollution Prevention Plan (SWPPP) is being prepared for the project, it may be submitted for this requirement as long as it fully describes post-construction control measures proposed;
- Direct or indirect changes in streambed slope, cross sectional dimension or area, vegetation, and/or surfacing;
- Changes in the drainage patterns and potential impacts to onsite and downstream waterbodies, including groundwater;
- The location and dimension of all associated access roads, work staging areas, and structures to be constructed on fill, piles, or floating platforms in waterbodies. Indicate if the structures are permanent or temporary (this should be reflected in Block 18 also). If temporary, provide a schedule or otherwise describe how long they will be placed in waterbodies, and how the site will be revegetated, restored, or otherwise reconditioned on their removal;
- Temporary or permanent dewatering or water diversions; and,
- Construction methods, timeline, and phasing plan.

**Block 16:** The Regional Board requires that all fill and other impacts to waters of the State be avoided to the extent practicable, and that unavoidable fill and/or other impacts be minimized. Provide information to demonstrate that the project has, to the extent practicable, avoided filling or otherwise adversely affecting waters of the State, and that any remaining impacts have been minimized.

- Describe efforts that have been or will be taken to avoid adverse impacts to waters of the State. Impact avoidance actions might include reconfiguring a project to avoid filling a waterway and to provide creek or wetland buffers, using a span bridge rather than a culvert for a roadway crossing, stacking units or parking structures to reduce project footprint, etc.
- For impacts that cannot be avoided, describe steps that have been or will be taken to minimize adverse impacts. Impact minimization actions might include using bioengineering techniques, sizing and designing structures to minimize hardscape (rather than applying standard designs), phasing or coordinating projects to reduce individual impacts, narrowing roadways to reduce impermeable surface area and associated stormwater runoff, etc.
- Describe and evaluate onsite and offsite alternatives to the project, consistent with the specifications of the U.S. EPA's Clean Water Act Section 404(b)(1) "Guidelines for Specification of Disposal Sites for Dredge or Fill Material", dated December 24, 1980.

**Block 17:** List any environmental documents (not including the CEQA documents listed in Block 20) that have been prepared for the project and/or the project site and which may contain information helpful to Regional Board staff in evaluating the project. Include wildlife and endangered species surveys, wetland or other jurisdictional delineations, hydrologic and geologic studies, groundwater studies, soil sampling reports, and so on. Provide the name of the document, the date prepared, and the name of the individual, firm, or agency that prepared it. Provide a copy of wetland delineations and endangered species surveys. Copies of other documents may be requested during staff review if additional information is needed to make a determination.

### 3. DREDGE & FILL INFORMATION

#### Block 18:

- If the activity involves the discharge of material into a wetland, creek, or other waterbody, including the temporary placement of material, list and explain each fill action.
- If the activity involves dredging material from a wetland, creek, or other waterbody, including "clean scoop" dredging, list and explain each dredge action.

- For each discharge/dredge action, describe the type and amount of material being discharged/dredged. State the quantity of each material being discharged in cubic yards.
- For each discharge/dredge action, provide the total estimated area of waters of the State that will be **temporarily and/or permanently** affected by a discharge or dredging. Specify temporary (T) or permanent (P). Area estimates should be provided in acres and, for projects affecting linear features such as creeks, channels, shorelines, and riparian corridors, additionally in linear feet. Dredging estimates should be provided in acres and cubic yards.
- Provide a map, plan, or figure that shows the location of each action.

**Block 18 Example:**

Map Location Number	LOCATION (show on plan & indicate waterbody)	REASON FOR ACTION (See instructions)	AMOUNT AND TYPE OF MATERIAL (in cubic yards, see instructions)	SURFACE AREA AFFECTED (in acres and/or linear feet; specify (T) or (P); see instructions)
1	NW corner of parcel on Creek A	Place riprap to stabilize slope	3 CY ¼-ton riprap 10 CY root wads	.002 acre (P)
2	Creek B above construction	Construct coffer dam to dewater site	15 CY bags of clean gravel	.002 acre (T)
3	Along length of Creek B	Reconstruct failing bank	60 CY ½-ton riprap	2,100 LF (0.72 acre) (P)
4	Along length of Creek A	Dredge channel bottom to increase capacity	Remove 2,000 CY of sediment	3,000 LF (1.37 acre) (P)

**4. MITIGATION**

**Block 19:** In most cases, if the proposed project involves unavoidable temporary or permanent impacts to wetlands and/or other waters of the State, mitigation will be required. Describe the proposed mitigation in terms of area and function. Functions to evaluate may include wetland or riparian habitat, aquatic habitat, groundwater recharge or discharge, flood peak attenuation, water quality enhancement, sediment retention, sediment transport, etc., and are dependent on the character and function of the waters impacted. Except in the situation of a very minor impact and simple mitigation, a Mitigation Plan should be attached that describes the proposed project's physical and biological impacts, mitigation goals, a mitigation work plan, a management and maintenance plan, success criteria and performance indicators, a monitoring plan, site protection measures, and financial assurance. Guidance for preparing a Mitigation Plan is available at [www.swrcb.ca.gov/rwqcb2/](http://www.swrcb.ca.gov/rwqcb2/). Mitigation proposals should be consistent with the "Habitat Mitigation and Monitoring Proposal Guidelines" (U.S. Army Corps of Engineers, San Francisco District, October 1991) and/or "Guidelines for Monitoring Riparian Mitigation Projects" (U.S. Army Corps of Engineers, San Francisco District, 1994).

**5. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

As a Responsible Agency under CEQA, the Regional Board is required to consider CEQA documents prepared by the Lead Agency<sup>1</sup> prior to taking a permitting action, to determine whether the CEQA document(s) are adequate, and whether there are any unmitigated environmental impacts. The Regional Board may not approve a project as proposed if there are any feasible alternatives or feasible mitigation measures "...that would substantially lessen or avoid any significant effect the project would have on the environment" (14 CCR 15096(g)(2)). The Regional Board must make an independent finding as a Responsible Agency that the project has adequately followed the CEQA process.

*Note: Although CEQA documentation is not required to complete an application, the Regional Board must be provided with, and have ample time to properly review, a final copy of valid CEQA documentation before taking a certification action. It is recommended that you provide copies of CEQA documents as soon as they are available.*

<sup>1</sup> The CEQA Lead Agency is usually the local agency with the most jurisdictional responsibility for a project.

**Block 20:** Identify the Lead Agency and contact. Provide the State Clearinghouse Number, if available. Provide the status, and date of completion where applicable, of any CEQA documents prepared for the project. Provide the exemption number (CCR Title 14 Section Number) for categorical or statutory exemptions. Attach a copy of any draft or final CEQA document(s). CEQA guidance is available at [http://ceres.ca.gov/topic/env\\_law/ceqa/guidelines/](http://ceres.ca.gov/topic/env_law/ceqa/guidelines/).

## 6. ADDITIONAL INFORMATION

**Block 21:** If any portion of the proposed project has been initiated, describe the work and the extent to which it has been completed, and provide the date(s) it was done. Indicate whether any enforcement action, such as a stop work order or legal complaint, has been made or is planned against the project.

**Block 22:** Title 23 CCR 3858 requires the Regional Board Executive Officer to provide public notice of an application for water quality certification at least twenty-one days before taking action on the application. Alternatively, the Applicant or a federal agency may provide such notice. Please indicate whether you or a federal agency has provided such notification, and if so, the date and time of notification (e.g., via newspaper of local circulation, Corps Public Notice, etc.) If public notice has not been provided, provide the name, address, and phone number (if available) of any property owners, lessees, etc., whose property adjoins this property and also adjoins any waterbody being impacted, as well as the name, address, and phone number (if available) of any parties known to be interested in the project.

**Block 23:** List other state, federal, and local licenses, permits and agreements ("permits") that will be required for any construction, operation, maintenance, or other actions associated with the project. This would include, but is not limited to, permits from agencies such as the California Department of Fish and Game (CDFG), U.S. Fish and Wildlife Service (USFWS), U.S. Army Corps of Engineers (USACE or Corps), San Francisco Bay Conservation and Development Commission (BCDC), the California Coastal Commission, the State Water Resources Control Board (SWRCB), or the Regional Water Board (SFBRWQCB). Such licenses or permits might include, but are not limited to CWA Section 404; Section 10 of the Rivers and Harbors Act of 1899; CDFG streambed alteration agreements; BCDC permits; local zoning, building, and flood-plain permits, water rights permits, and any other permits or orders from the SFBRWQCB. For each permit, provide the permit number (if available), the name and telephone number of a contact person at the permitting agency, and the date and status of application.

Attach copies of all final (or draft if not finalized) documents.

Note regarding federal permits: If no federal applications are required, provide a copy of any notification(s) concerning the proposed activity issued by the federal agency(ies). If no federal notifications are issued, provide a copy of any correspondence between the Applicant and the federal agency(ies) describing or discussing the proposed activity. If no application, notification, correspondence or other document must be exchanged between the Applicant and federal agency(ies) prior to the start of the activity, the application must include a written statement to this effect: If the federal licenses or permits required for the activity include a FERC license or amendment to a FERC license, DO NOT USE THIS APPLICATION, CONTACT THE STATE WATER RESOURCES CONTROL BOARD.

**Block 24:** List and describe any projects implemented by the Applicant within the last five years, or planned by the Applicant for implementation within the five years, that are in any way related to the proposed activity or that may impact the same receiving waterbody(ies) as the proposed activity. For purposes of this item, the waterbody extends to a named source or stream segment identified in the Regional Board's Basin Plan.

**Block 25:** Signature of the responsible party or authorized agent indicated in blocks 1 through 7 of the application.

**For assistance, please contact the technical staff representative listed below for the county in which the project is located (current as of May 2002):**

Alameda	Keith Lichten	(510)	622-2380	<a href="mailto:pro@rb2.swrcb.ca.gov">pro@rb2.swrcb.ca.gov</a>
Contra Costa	Tina Low	(510)	622-5682	<a href="mailto:tjl@rb2.swrcb.ca.gov">tjl@rb2.swrcb.ca.gov</a>
Marin	Farhad Ghodrati	(510)	622-2331	<a href="mailto:fg@rb2.swrcb.ca.gov">fg@rb2.swrcb.ca.gov</a>
Napa	Tobi Tyler	(510)	622-2431	<a href="mailto:tt@rb2.swrcb.ca.gov">tt@rb2.swrcb.ca.gov</a>
San Francisco	John West	(510)	622-2352	<a href="mailto:jrw@rb2.swrcb.ca.gov">jrw@rb2.swrcb.ca.gov</a>
San Mateo (Bayside)	Habte Kifle	(510)	622-2371	<a href="mailto:hk@rb2.swrcb.ca.gov">hk@rb2.swrcb.ca.gov</a>
San Mateo (Coastal)	Ann Crum	(510)	622-2474	<a href="mailto:amc@rb2.swrcb.ca.gov">amc@rb2.swrcb.ca.gov</a>
Santa Clara	Brian Wines	(510)	622-5680	<a href="mailto:bkw@rb2.swrcb.ca.gov">bkw@rb2.swrcb.ca.gov</a>
Solano	Stephen Berger	(510)	622-2345	<a href="mailto:slb@rb2.swrcb.ca.gov">slb@rb2.swrcb.ca.gov</a>
Sonoma	Carmen Fewless	(510)	622-2316	<a href="mailto:crf@rb2.swrcb.ca.gov">crf@rb2.swrcb.ca.gov</a>



# California Regional Water Quality Control Board

## San Francisco Bay Region



Winston H. Hickox  
Secretary for  
Environmental  
Protection

Internet Address: <http://www.swrcb.ca.gov>  
1515 Clay Street, Suite 1400, Oakland, California 94612  
Phone (510) 622-2300 • FAX (510) 622-2460

Gray Davis  
Governor

### WATER QUALITY CERTIFICATION FEE SCHEDULE

Effective June 24, 2000

Section 401 of the Clean Water Act delegates to states the authority to certify that discharges requiring a federal permit comply with state and federal water quality standards and with state laws. Pursuant to Title 23, California Code of Regulations (23 CCR) Section 3838, regional boards and their executive are authorized to take water quality certification action on applications for such certification within their region of jurisdiction.

23 CCR Sections 2200 (e) and 3833 (b) (2) (A) prescribe the following fees for certification of activities that may involve a discharge of dredged or fill material:

1. All applications for certification must include an initial deposit of \$500.
2. The total fee, including deposit, for issuing standard certification as defined in 23 CCR 3831 (p) shall be at least \$500, but not more than the fees in 3. or 4. below.
3. The total fee, including deposit, for issuing a certification action for fill:
  - One acre or less, total fee of \$1000
  - More than one acre, \$1000 per acre or part thereof, to a maximum of \$10,000
4. The total fee, including deposit, for issuing a certification action for dredging:
  - Less than 10,000 cubic yards, total fee of \$500
  - 10,000 to 20,000 cubic yards, total fee of \$2000
  - More than 20,000 cubic yards, \$2000 plus \$250 for each additional 5000 cubic yards or part thereof, to a maximum of \$10,000

An application cannot be considered complete without the initial deposit of \$500. Any certification action is not effective until payment of the required total fee.

Whenever certification of a federal general permit for an activity that may involve a discharge of dredged or fill material requires the permittee to send a notice to the Regional Board of its intent to proceed with the permitted activity, that permittee shall provide the Board a fee of \$60.

*All fees should be made payable to and submitted to the Regional Water Quality Control Board at the above address, attention: 401 Certifications.*

# UNDERGROUND STORAGE TANK UNAUTHORIZED RELEASE (LEAK) / CONTAMINATION SITE REPORT

<b>EMERGENCY</b> <input type="checkbox"/> YES <input type="checkbox"/> NO		<b>HAS STATE OFFICE OF EMERGENCY SERVICES REPORT BEEN FILED?</b> <input type="checkbox"/> YES <input type="checkbox"/> NO		<b>FOR LOCAL AGENCY USE ONLY</b> I HEREBY CERTIFY THAT I HAVE DISTRIBUTED THIS INFORMATION ACCORDING TO THE DISTRIBUTION SHOWN ON THE INSTRUCTION SHEET ON THE BACK PAGE OF THIS FORM	
<b>REPORT DATE</b> M / D / Y		<b>CASE #</b>		<b>SIGNED</b> _____ <b>DATE</b> _____	
<b>REPORTED BY</b>	<b>NAME OF INDIVIDUAL FILING REPORT</b>		<b>PHONE</b> ( )		<b>SIGNATURE</b>
	<b>REPRESENTING</b> <input type="checkbox"/> OWNER/OPERATOR <input type="checkbox"/> REGIONAL BOARD <input type="checkbox"/> LOCAL AGENCY <input type="checkbox"/> OTHER		<b>COMPANY OR AGENCY NAME</b>		
<b>RESPONSIBLE PARTY</b>	<b>ADDRESS</b>				
	<b>STREET</b> _____ <b>CITY</b> _____ <b>STATE</b> _____ <b>ZIP</b> _____				
<b>SITE LOCATION</b>	<b>NAME</b> _____ <input type="checkbox"/> UNKNOWN		<b>CONTACT PERSON</b>		<b>PHONE</b> ( )
	<b>ADDRESS</b>				
<b>IMPLEMENTING AGENCIES</b>	<b>FACILITY NAME (IF APPLICABLE)</b>		<b>OPERATOR</b>		<b>PHONE</b> ( )
	<b>ADDRESS</b>				
<b>SUBSTANCES INVOLVED</b>	<b>STREET</b> _____ <b>CITY</b> _____ <b>STATE</b> _____ <b>ZIP</b> _____		<b>CROSS STREET</b> _____		
	<b>LOCAL AGENCY</b> _____ <b>AGENCY NAME</b> _____		<b>CONTACT PERSON</b>		<b>PHONE</b> ( )
<b>DISCOVERY/ABATEMENT</b>	<b>REGIONAL BOARD</b> _____		<b>PHONE</b> ( )		<b>PHONE</b> ( )
	<b>NAME</b> _____ <b>QUANTITY LOST (GALLONS)</b> _____ <input type="checkbox"/> UNKNOWN				
<b>CASE TYPE</b>	<b>DATE DISCOVERED</b> M / D / Y		<b>HOW DISCOVERED</b> <input type="checkbox"/> TANK TEST <input type="checkbox"/> TANK REMOVAL <input type="checkbox"/> INVENTORY CONTROL <input type="checkbox"/> SUBSURFACE MONITORING <input type="checkbox"/> NUISANCE CONDITIONS <input type="checkbox"/> OTHER		
	<b>DATE DISCHARGE BEGAN</b> M / D / Y <input type="checkbox"/> UNKNOWN		<b>METHOD USED TO STOP DISCHARGE (CHECK ALL THAT APPLY)</b> <input type="checkbox"/> REMOVE CONTENTS <input type="checkbox"/> CLOSE TANK & REMOVE <input type="checkbox"/> REPAIR PIPING <input type="checkbox"/> REPAIR TANK <input type="checkbox"/> CLOSE TANK & FILL IN PLACE <input type="checkbox"/> CHANGE PROCEDURE <input type="checkbox"/> REPLACE TANK <input type="checkbox"/> OTHER		
<b>CURRENT STATUS</b>	<b>HAS DISCHARGE BEEN STOPPED?</b> <input type="checkbox"/> YES <input type="checkbox"/> NO IF YES, DATE M / D / Y		<b>SOURCE / CAUSE</b> <input type="checkbox"/> TANK LEAK <input type="checkbox"/> UNKNOWN <input type="checkbox"/> OVERFILL <input type="checkbox"/> RUPTURE/FAILURE <input type="checkbox"/> SPILL <input type="checkbox"/> PIPING LEAK <input type="checkbox"/> OTHER <input type="checkbox"/> CORROSION <input type="checkbox"/> UNKNOWN <input type="checkbox"/> OTHER		
	<b>CHECK ONE ONLY</b> <input type="checkbox"/> UNDETERMINED <input type="checkbox"/> SOIL ONLY <input type="checkbox"/> GROUNDWATER <input type="checkbox"/> DRINKING WATER (CHECK ONLY IF WATER WELLS HAVE ACTUALLY BEEN AFFECTED)				
<b>REMEDIAL ACTION</b>	<b>CHECK ONE ONLY</b> <input type="checkbox"/> NO ACTION TAKEN <input type="checkbox"/> PRELIMINARY SITE ASSESSMENT WORKPLAN SUBMITTED <input type="checkbox"/> POLLUTION CHARACTERIZATION <input type="checkbox"/> LEAK BEING CONFIRMED <input type="checkbox"/> PRELIMINARY SITE ASSESSMENT UNDERWAY <input type="checkbox"/> POST CLEANUP MONITORING IN PROGRESS <input type="checkbox"/> REMEDIATION PLAN <input type="checkbox"/> CASE CLOSED (CLEANUP COMPLETED OR UNNECESSARY) <input type="checkbox"/> CLEANUP UNDERWAY				
	<b>CHECK APPROPRIATE ACTION(S)</b> <input type="checkbox"/> CAP SITE (CD) <input type="checkbox"/> ENCAVATE & DISPOSE (ED) <input type="checkbox"/> REMOVE FREE PRODUCT (FP) <input type="checkbox"/> ENHANCED BIO DEGRADATION (BT) <input type="checkbox"/> CONTAINMENT BARRIER (CB) <input type="checkbox"/> EXCAVATE & TREAT (ET) <input type="checkbox"/> PUMP & TREAT GROUNDWATER (GT) <input type="checkbox"/> REPLACE SUPPLY (RS) <input type="checkbox"/> VACUUM EXTRACT (VE) <input type="checkbox"/> NO ACTION REQUIRED (NA) <input type="checkbox"/> TREATMENT AT HOOKUP (HL) <input type="checkbox"/> VENT SOIL (VS) <input type="checkbox"/> OTHER (OT)				

EXHIBIT

6

Search "accident release form"  
RW & CB site